254 N.C. App.—No. 2 Pages 243-347

ADVANCE SHEETS

OF

CASES

ARGUED AND DETERMINED IN THE

COURT OF APPEALS

OF

NORTH CAROLINA

AUGUST 13, 2019

MAILING ADDRESS: The Judicial Department
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OF
NORTH CAROLINA

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[1]Sworn in 1 January 2017. [2]Sworn in 1 January 2017. [3]Appointed 24 April 2017, elected 6 November 2018, and sworn in for full term 3 January 2019. [4]Sworn in 1 January 2019. [5]Sworn in 1 January 2019. [6]Sworn in 30 April 2019. [7]Sworn in 26 April 2019. [8]Retired 31 December 2016.
[9]Retired 24 April 2017. [10]Appointed 1 August 2016. Term ended 31 December 2016.
[11]Retired 31 December 2018. [12]Retired 31 December 2018. [13]Resigned 24 March 2019.

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COURT OF APPEALS

CASES REPORTED

FILED 5 JULY 2017

CASES REPORTED WITHOUT PUBLISHED OPINIONS

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TERMINATION OF PARENTAL RIGHTS

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SCHEDULE FOR HEARING APPEALS DURING 2019

NORTH CAROLINA COURT OF APPEALS

Cases for argument will be calendared during the following weeks in 2019:

January 14 and 28

February 11 and 25

March 11 and 25

April 8 and 22

May 6 and 20

June 3

July None Scheduled

August 5 and 19

September 2 (2nd Holiday), 16 and 30

October 14 and 28

November 11 (11th Holiday)

December 2

Opinions will be filed on the first and third Tuesdays of each month.

FARQUHAR v. FARQUHAR

[254 N.C. App. 243 (2017)]

BEVERLY SHOOK FARQUHAR, PLAINTIFF
v.
PETER MICHAEL FARQUHAR, DEFENDANT

No. COA16-1271

Filed 5 July 2017

Jurisdiction—subject matter—alimony—equitable distribution—divorce judgment—two marriages between parties—Rule 41(a)

In an action involving a couple who married and divorced twice, the trial court did not err by dismissing plaintiff wife's alimony and equitable distribution claims that were still pending after their first divorce. When the parties reconciled and entered into a second marriage, they entered into a joint voluntary dismissal of their pending claims. N.C.G.S. § 1A-1, Rule 41(a) provides that a new action asserting those claims had to be refiled within one year of the joint dismissal; the time for the claims was not tolled by the second marriage.

Appeal by plaintiff from order entered 20 July 2016 by Judge Susan R. Burch in Guilford County District Court. Heard in the Court of Appeals 17 May 2017.

Martha C. Massie for plaintiff-appellant.

Black Slaughter & Black, P.A., by Ashley D. Bennington, for defendant-appellee.

ZACHARY, Judge.

Plaintiff Beverly Farquhar (Beverly) appeals from an order dismissing her claims for alimony and equitable distribution pursuant to Rule 12(b)(1) of the North Carolina Rules of Civil Procedure. For the reasons that follow, we affirm the district court's order of dismissal.

I. Background

Beverly and defendant Peter Farquhar (Peter) have married each other on two separate occasions. The parties were first married on 30 December 1993, and they separated approximately ten years later, on 24 January 2003. In February 2003, Beverly filed an action in Caldwell County District Court for divorce from bed and board, equitable distribution, post-separation support, alimony, and attorneys' fees (the

Caldwell County action). Three months later, Peter filed an answer in the Caldwell County action along with his own counterclaim for equitable distribution.

Beverly and Peter were divorced pursuant to a judgment entered 23 April 2004. However, Beverly's claims for alimony and equitable distribution as well as Peter's claim for equitable distribution were not resolved in any manner by the divorce judgment. All of those claims were pending in May 2005, when the parties decided to remarry. Shortly after entering their second marriage, Beverly and Peter entered into a joint voluntary dismissal of their pending claims. The joint dismissal was filed on 26 August 2005.

Beverly and Peter's second marriage lasted approximately ten years. However, on 16 February 2015, Peter filed a verified complaint in Guilford County District Court seeking divorce from bed and board, injunctive relief, and return of separate property accumulated during the second marriage. The parties then separated for the second time on or about 1 April 2015. Two weeks later, Beverly filed an answer to Peter's complaint, which included counterclaims for divorce from bed and board, post-separation support, alimony, equitable distribution, and attorneys' fees. On 3 December 2015, Beverly filed a verified complaint in Guilford County Superior Court alleging claims for equitable distribution, alimony, and attorneys' fees related to the parties' first marriage.

On 30 December 2015, Peter filed a motion to dismiss Beverly's claims arising out of the first marriage pursuant to Rules 12(b)(1) and (6) of the North Carolina Rules of Civil Procedure. The gravamen of Peter's motion was that the trial court lacked jurisdiction over Beverly's complaint because the claims arising out of the first marriage were voluntarily dismissed after the parties' second marriage and were not refiled within one year of their dismissal, as required by Civil Procedure Rule 41(a). For the same reasons, Peter contended that Beverly's complaint failed to state claims upon which relief could be granted.

After hearing the motion to dismiss on 18 February 2016, and then reconvening on 21 April 2016, the Honorable Susan R. Burch concluded that Beverly's complaint was barred by the application of Rule 41(a), which required her claims for alimony and equitable distribution arising of out the first marriage to be refiled within one year of their dismissal. According to Judge Burch, this was so even though the parties had remarried before filing the joint voluntary dismissal. On 20 July 2016, the district court entered an order that memorialized its oral ruling, concluded that the court lacked subject matter jurisdiction over the claims

set forth in Beverly's complaint, and granted Peter's motion to dismiss. Beverly now appeals from the dismissal of her complaint.

II. Standard of Review

"Subject matter jurisdiction refers to the power of the court to deal with the kind of action in question [and] is conferred upon the courts by either the North Carolina Constitution or by statute." *Harris v. Pembaur*, 84 N.C. App. 666, 667, 353 S.E.2d 673, 675 (1987) (citations omitted). An order granting a Rule 12(b)(1) motion to dismiss for lack of subject matter jurisdiction is subject to *de novo* review. *Burgess v. Burgess*, 205 N.C. App. 325, 327, 698 S.E.2d 666, 668 (2010). "Under the *de novo* standard of review, this Court 'considers the matter anew and freely substitutes its own judgment for that of the [trial court].' " *Id.* (quoting *In re Appeal of the Greens of Pine Glen Ltd. P'ship*, 356 N.C. 642, 647, 576 S.E.2d 316, 319 (2003)).

III. Discussion

Rule 41(a) of the North Carolina Rules of Civil Procedure provides, in pertinent part:

> Subject to the provisions of Rule 23(c) and of any statute of this State, an action or any claim therein may be dismissed by the plaintiff without order of court . . . (ii) by filing a stipulation of dismissal signed by all parties who have appeared in the action. . . . If an action commenced within the time prescribed therefor, or any claim therein, is dismissed without prejudice under this subsection, a new action based on the same claim may be commenced within one year after such dismissal. . . .

"Rule 41(a)(1) extends the time within which a party may refile suit after taking a voluntary dismissal when the refiled suit involves the same parties, rights and cause of action as in the first action." *Holley v. Hercules*, Inc., 86 N.C. App. 624, 628, 359 S.E.2d 47, 50 (1987).

On appeal, Beverly acknowledges the general rule contained in Rule 41(a), but maintains that the unique factual circumstances of this case present a "loophole." Beverly contends that because the parties' second marriage occurred before the joint voluntary dismissal was filed in August 2005, she lacked the ability to refile her alimony and equitable distribution claims based on the parties' first marriage. According to Beverly, Rule 41(a)'s one-year savings provision was therefore tolled during the parties' second marriage, as she had no ability to refile her claims arising out the first marriage. We disagree.

As a general rule, a judgment for absolute divorce destroys a spouse's right to seek equitable distribution or alimony unless those claims are pending at the time that the divorce judgment is entered. N.C. Gen. Stat. § 50-11(c), (e) (2015). In *Stegall v. Stegall*, however, our Supreme Court held that "if alimony and equitable distribution claims are properly asserted, whether by the filing of an action or raising of counterclaims, and are not voluntarily dismissed pursuant to Rule 41(a)(1) until after judgment of absolute divorce is entered, a new action based on those claims may be filed within the one-year period provided by the rule." 336 N.C. 473, 479, 444 S.E.2d 177, 181 (1994). Under *Stegall*, alimony and equitable distribution claims that are pending *at the time* a divorce judgment is entered and are then later voluntarily dismissed may nonetheless survive and may be refiled within the one year period established by Rule 41(a). *Id.* Having carefully reviewed the factual and procedural background in this case, we conclude that the rule announced in *Stegall* controls this case.

Here, Beverly's alimony and equitable distribution claims based on the first marriage were pending when the parties' divorce judgment was entered in the Caldwell County action on 23 April 2004. The joint dismissal, filed 26 August 2005, caused Beverly's alimony and equitable distribution claims (arising out of the first marriage) to be dismissed. Thus, under *Stegall*, Beverly had one year within which to refile those claims; however, Beverly chose not to do so. Because it is clear that the alimony and equitable distribution claims that Beverly filed against Peter in 2015 are the same claims that she filed in 2003 (that is, based on the first marriage), they were subject to Rule 41(a)'s restrictions and were barred by the Rule.

We are cognizant that Beverly (presumably) did not refile those claims because she had reconciled with Peter and entered into a second marriage with him. However, the rule in *Stegall* is clear—because the joint dismissal followed the entry of the divorce judgment, Beverly's claims for alimony and equitable distribution survived, but a new action asserting those claims had to be re-filed within one year of the joint dismissal. Beyond that, we refuse to hold that when alimony and equitable distribution claims based on a first marriage are voluntarily dismissed after a divorce judgment, those claims are indefinitely tolled by a second marriage of the parties so that they may be tucked away and used as a sword in a hypothetical, future action. Beverly's 2015 claims for alimony and equitable distribution arising out the first marriage were barred by the application of Rule 41(a). Accordingly, the district court lacked subject matter jurisdiction to adjudicate those claims and they were properly dismissed.

IV. Conclusion

For the reasons stated above, we affirm the district court's order dismissing Beverly's claims for alimony and equitable distribution.

AFFIRMED.

Judges DILLON and BERGER, JR. concur.

BLAKE J. GEOGHAGAN, PLAINTIFF
v.
BERNADETTE M. GEOGHAGAN, DEFENDANT

No. COA16-766

Filed 5 July 2017

Divorce—equitable distribution—joinder of necessary parties—closely-held corporation—limited liability companies

An equitable distribution order was null and void where it did not include two limited liability companies that were subsidiaries to a corporation owned jointly by plaintiff and defendant. The subsidiaries were necessary parties.

Appeal by Plaintiff from judgment and order entered 12 December 2012 by Judge Christy T. Mann, and from order entered 12 February 2016 by Judge Alicia D. Brooks in District Court, Mecklenburg County. Heard in the Court of Appeals 9 February 2017.

Marshall & Taylor, PLLC, by Travis R. Taylor, for Plaintiff.

No brief for Defendant.

McGEE, Chief Judge.

Blake J. Geoghagan ("Plaintiff") appeals from an equitable distribution judgment and order ("equitable distribution order") that, *inter alia*, limited the distributions and amount of compensation he could receive from Blake Bern Partners, Inc. ("BBPI"), a closely-held corporation he jointly owned with his then-wife, Bernadette M. Geoghagan ("Defendant"). Plaintiff also appeals from an order denying his motion for relief from the equitable distribution order, pursuant to the grounds

for relief set out in N.C. Gen. Stat. § 1A-1, Rule 60 ("Rule 60 order"). We vacate both orders and remand for further proceedings.

I. Background

Plaintiff and Defendant were married on 5 April 1997. During their marriage, Plaintiff and Defendant each acquired fifty percent of the outstanding stock in BBPI, a Florida corporation "formed for the principal purpose of developing, opening and operating a series of franchised restaurants known as Five Guys Burgers and Fries" ("Five Guys") in Florida's panhandle region. BBPI was incorporated in 2006, and the corporation was the sole member of four limited liability companies (the "subsidiary LLCs"). Plaintiff acted as the manager of each of the subsidiary LLCs of which BBPI was a member.

Plaintiff filed a complaint against Defendant on 15 October 2009 in Mecklenburg County District Court seeking, *inter alia*, custody of their four children, child support, and equitable distribution of the marital estate and other divisible property and debt. Defendant filed an answer on 11 January 2010, along with counterclaims for child custody, child support, post-separation support, alimony, equitable distribution of marital and divisible property and debts, and attorney's fees. A trial was conducted on Plaintiff's and Defendant's claims for equitable distribution in June and July of 2012, and the trial court entered the equitable distribution order on 12 December 2012. The equitable distribution order contains exhaustive findings of fact, conclusions of law, and orders on the debts and assets owned by Plaintiff and Defendant; we discuss only those relevant to the resolution of this appeal. The equitable distribution order contains numerous findings of fact regarding BBPI, including, *inter alia*, findings regarding the ownership of BBPI by Plaintiff and Defendant, the franchise and development agreement between Five Guys and BBPI, current operations of BBPI, and a valuation of BBPI.

Due to Plaintiff's "hands on" operation of BBPI and his experience in the restaurant industry, the trial court distributed all of the shares of BBPI to Plaintiff. The trial court found as fact that an unequal distribution of marital and divisible property was equitable, and it was necessary for Plaintiff to pay a distributive award to Defendant in the amount of $997,494.46 primarily because "the [fair market value] of BBPI," which was distributed to Plaintiff, "[was] greater than the [fair market value] of all other items of property combined, and because BBPI is a closely-held business entity" that Plaintiff and Defendant could not "jointly own and operate . . . in a cooperative manner." As the court had distributed BBPI to Plaintiff, it ordered Plaintiff to make "good faith efforts to substitute

himself for [Defendant] as guarantor of all debts and obligations of BBPI," and further ordered Plaintiff to "indemnify [Defendant], and hold her harmless, from all liability relating to" a bank loan made to BBPI, all BBPI leases, all agreements between BBPI and its various vendors, and all other debts and liabilities of BBPI.

If Plaintiff was unable to pay the $997,494.46 distributive award to Defendant by 15 April 2013, the trial court ordered that Plaintiff sell his ownership interests in BBPI to satisfy the award. The trial court further ordered that, "[u]ntil the distributive award is paid in full, [Plaintiff] shall not receive salary, bonuses, or other compensation from BBPI or [the subsidiary LLCs] in excess of $170,000.00 per year[,]" and that "[u]ntil the distributive award is paid in full, [Plaintiff] shall not receive any distributions from BBPI, except for reimbursement of expenses he incurs on behalf of BBPI, and except for repayment of loans from shareholder."

Proceedings on Plaintiff's and Defendant's remaining claims continued in the ensuing years. On 9 June 2015, Plaintiff filed a motion for relief from the equitable distribution order pursuant to N.C.G.S. § 1A-1, Rule 60 ("Rule 60 motion"). In Plaintiff's Rule 60 motion, he contended, *inter alia*, that, although BBPI was never made a party to the proceedings, "the [trial court] exerted significant control over [BBPI's] assets and operations[,]" and he asked the trial court to vacate the equitable distribution order. The trial court entered an order denying Plaintiff's Rule 60 motion on 12 February 2016, finding that, although BBPI was never made a party to the proceedings, "the failure to join BBPI in the trial is an issue of law that should be properly addressed on appeal." Plaintiff appeals.

II. Analysis: BBPI and the Subsidiary LLCs as Necessary Parties

Plaintiff argues the equitable distribution order must be vacated because it commands BBPI and the subsidiary LLCs to refrain from taking certain actions without joining them as necessary parties to the proceedings. We agree. A "necessary party" is a party that "is so vitally interested in the controversy involved in the action that a valid judgment cannot be rendered in the action completely and finally determining the controversy without [its] presence as a party." *Booker v. Everhart*, 294 N.C. 146, 156, 240 S.E.2d 360, 365-66 (1978) (citations omitted). This Court has also described a necessary party as "one whose interest will be directly affected by the outcome of the litigation." *Begley v. Employment Security Comm.*, 50 N.C. App. 432, 438, 274 S.E.2d 370, 375 (1981) (citations and quotation marks omitted). "When a complete determination of the matter cannot be had without the presence of other

parties, the court must cause them to be brought in." *Booker*, 294 N.C. at 156, 240 S.E.2d at 366.

In the present case, we find that BBPI and the subsidiary LLCs were necessary parties to the proceedings antecedent to the equitable distribution order. The equitable distribution order states that Plaintiff "shall not receive salary, bonuses, or other compensation from BBPI or [the subsidiary LLCs] in excess of $170,000.00 per year" and "shall not receive any distributions from BBPI," beyond those specifically listed in the order, "[u]ntil the distributive award is paid in full[.]" While couched in terms suggesting the equitable distribution order was directed at Plaintiff, the trial court clearly restricted the ability of BBPI and the subsidiary LLCs to act. Just as Plaintiff was not able to "receive salary, bonuses, or other compensation" in excess of $170,000.00, BBPI and the subsidiary LLCs were not able to pay salary, bonuses, or other compensation to Plaintiff above the listed amount; likewise, since Plaintiff was forbidden to "receive" a distribution from BBPI, BBPI could not issue a distribution to him. *See Campbell v. Campbell*, 241 N.C. App. 227, 232, 773 S.E.2d 93, 96 (2015) (holding that where a corporation was "effectively ordered" to take certain actions without being joined as a party to the proceedings, the order must be vacated). Because "a complete determination" of Plaintiff's and Defendant's equitable distribution claims could not be reached without the presence of BBPI and the subsidiary LLCs, the trial court was required to cause them to be added as parties to the action. *Booker*, 294 N.C. at 156, 240 S.E.2d at 366.

We recognize that BBPI is wholly owned by Plaintiff and Defendant, and the subsidiary LLCs are, in turn, owned by BBPI. However, "[a] corporation, even one closely held, is recognized as a separate legal entity . . . [even when its members are] engaged in litigation which is personal in nature[.]" *Quick v. Quick*, 305 N.C. 446, 460, 290 S.E.2d 653, 662 (1982). And as with a corporation, our courts "are not free, for the sake of convenience, to completely ignore the existence of a legal entity, such as [an] LLC." *Keith v. Wallerich*, 201 N.C. App. 550, 558, 687 S.E.2d 299, 304 (2009). As this Court has held,

> where a separate legal entity has not been made a party to an action, the trial court does not have the authority to order that entity to act. Moreover, even where a named party to an action is a member-manager of an LLC, the assets of which are contested in a pending equitable distribution action, the trial court exceeds its authority when it orders that named party to transfer the assets of the LLC without first adding the LLC as a party to the action.

Campbell, 241 N.C. App. at 231-32, 773 S.E.2d at 96 (citation and internal brackets omitted). Thus, although BBPI was a closely-held corporation owned by Plaintiff and Defendant, and the subsidiary LLCs owned by BBPI were managed by Plaintiff, the trial court was not free to ignore the corporate form nor the existence of the subsidiary LLCs when entering the equitable distribution order.

We note in the present case that, unlike in *Campbell*, neither Plaintiff nor Defendant ever sought to add BBPI or the subsidiary LLCs as parties to the equitable distribution proceedings. However, N.C. Gen. Stat. § 1A-1, Rule 19 requires that an entity united in interest[1] "must be joined as [a] plaintiff[] or defendant[]." N.C. Gen. Stat. § 1A-1, Rule 19 (2015). This requirement applies regardless of whether a party to the lawsuit has properly moved for joinder of the necessary party:

> When there is [an] absence of necessary parties, the trial court should correct the defect *ex mero motu* upon failure of a competent person to make a proper motion. A judgment which is determinative of a claim arising in an action in which necessary parties have not been joined is null and void.

Boone v. Rogers, 210 N.C. App. 269, 271, 708 S.E.2d 103, 105 (2011) (citation omitted). Pursuant to *Boone*, it was necessary for the trial court in this matter to *ex mero motu* join BBPI and the subsidiary LLCs before ordering them to refrain from paying Plaintiff more than a certain amount in annual compensation, and before restricting whether BBPI could make a distribution to Plaintiff. Therefore, the equitable distribution order is "null and void" due to the absence of necessary parties. *Id.*

III. Conclusion

For the reasons stated, the trial court's equitable distribution order is vacated. We decline to address Plaintiff's alternative arguments as to why the equitable distribution order was entered in error. *See McCraw v. Aux*, 205 N.C. App. 717, 721, 696 S.E.2d 739, 741 (2010) ("As a necessary party was not properly joined we refuse to deal with the merits of the action until the necessary party is brought into the action." (citation and internal quotation marks omitted)). In light of this result, we also

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1. A person or entity "is 'united in interest' with another party when that person's [or entity's] presence is necessary in order for the court to determine the claim before it without prejudicing the rights of a party before it or the rights of others not before the court." *Ludwig v. Hart*, 40 N.C. App. 188, 190, 252 S.E.2d 270, 272 (1979).

vacate the trial court's Rule 60 order as moot. *See Khwaja v. Khan*, 239 N.C. App. 87, 92, 767 S.E.2d 901, 904 (2015) (vacating a Rule 60 order as moot when the order from which the movant sought relief through the Rule 60 motion had been reversed).

This case is remanded for *ex mero motu* joinder of BBPI and the subsidiary LLCs as necessary parties. Following joinder of the necessary parties, the trial court shall conduct further proceedings, as appropriate, regarding Plaintiff's and Defendant's equitable distribution claims.

VACATED AND REMANDED.

Judges DAVIS and MURPHY concur.

IN THE MATTER OF A.L.L., R.J.M., R.A.M., A.O.Z., D.A.M., O.E.J.M.

No. COA17-146

Filed 5 July 2017

1. Jurisdiction—subject matter jurisdiction—Uniform Child Custody Jurisdiction and Enforcement Act—termination of parental rights

The trial court properly exercised subject matter jurisdiction in a termination of parental rights case involving children who had been moved from Michigan to North Carolina. Michigan and North Carolina have codified the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA) in virtually identical terms: North Carolina would have acquired initial jurisdiction but for an existing Michigan action, but could still assert jurisdiction once Michigan determined that North Carolina would be a more convenient forum and relinquished jurisdiction. Nothing in the UCCJEA required North Carolina's district courts to undertake a collateral review of a facially valid order from a sister state before exercising jurisdiction under N.C.G.S. § 50A-203(1).

2. Termination of Parental Rights—due process—lack of notice—child custody proceedings

The trial court did not violate respondent father's right to due process and notice in a termination of parental rights case where the children were moved from Michigan to North Carolina To the extent that his due process rights were frustrated or denied, they

were denied in Michigan and not North Carolina. Also, the lack of service on the father for earlier custody and adjudication proceedings in North Carolina did not defeat the valid service and notice provided him in North Carolina for the termination hearing.

3. Termination of Parental Rights—permanency orders—findings—ceasing reunification efforts—failure to include or request transcript

The Court of Appeals denied respondent father's petition for certiorari challenging permanency orders in a termination of parental rights case. The contents of termination orders cure defects in a prior permanency planning order. Further, the father's failure to include the transcripts of the permanency planning hearings or request their inclusion via a motion meant the Court of Appeals was obligated to consider the court's findings at those hearings as supported by competent evidence.

4. Termination of Parental Rights—grounds—dependency

The trial court did not err by terminating respondent mother's parental rights based on dependency. The mother's longstanding mental health conditions and her repeated failures to follow recommendations for treatment necessary to care for her children safely constituted clear, cogent, and convincing evidence to support the trial court's findings of dependency.

5. Termination of Parental Rights—best interests of children—findings of fact—likelihood of adoption

The trial court did not abuse its discretion by determining that termination of respondent mother's parental rights would be in the best interests of her children even though the mother challenged the finding that their likelihood of adoption remained high. Documentary evidence and testimony produced by the children's guardian ad litem noted that with the continuation of appropriate therapies the children would be adoptable and that they had developed positive bonds with their caretakers.

6. Termination of Parental Rights—best interests of children—findings of fact—behavioral issues

The trial court did not abuse its discretion by finding termination of respondent mother's parental rights was in the best interests of the children even though the mother noted the trial court's failure to make detailed findings concerning the children's behavioral issues. The order contained a finding addressing this behavior.

IN RE A.L.L.

[254 N.C. App. 252 (2017)]

Appeals by Respondents Father and Mother from an Order to Terminate Parental Rights entered 14 November 2016 by Judge Betty J. Brown in Guilford County District Court; appeal by Respondent Father from orders entered 4 June 2015, 17 December 2015 and 3 June 2016 by Judge Angela C. Foster in Guilford County District Court. Heard in the Court of Appeals 5 June 2017.

Mercedes O. Chut, for petitioner-appellee Guilford County Department of Health and Human Services.

Lopez Law Firm, by Daniel J. Melo, for guardian ad litem.

Miller & Audino, LLP, by Jeffrey L. Miller, for respondent-appellant father.

Assistant Appellate Defender J. Lee Gilliam, for respondent-appellant mother.

INMAN, Judge.

A North Carolina court properly exercises jurisdiction over children living in this state and alleged to be abused, neglected or dependent, even if the children were previously the subject of custody orders and continuing jurisdiction by a foreign state court, once the foreign court enters a facially valid order declining further jurisdiction.

Respondent-mother ("Mother") appeals from an order terminating her parental rights as to her minor children A.L.L. ("Abigail"), R.J.M. ("Riley"), R.A.M. ("Robert"), A.O.Z. ("Ava"), D.A.M. ("Diana"), and O.E.J.M. ("Oscar"); Respondent-father ("Father") appeals the same order terminating his parental rights as to Abigail, Riley, and Robert[1] and seeks certiorari review of three permanency planning orders entered on 4 June 2015, 17 December 2015, and 3 June 2016 (the "Permanency Orders"). Mother contends that the trial court erred in finding that the children were dependent and that Mother had failed to make reasonable progress in correcting the conditions that led to their removal, and argues the trial court abused its discretion in determining the termination of parental rights would be in the best interests of Riley and Robert. Father contends that the trial court lacked subject matter jurisdiction to terminate his parental rights to Abigail, Riley, and Robert, and, in his

1. Father is the biological parent of only Riley, Robert, and Abigail; the putative and unknown fathers of Ava, Diana, and Oscar did not appeal.

petition for certiorari, contends that the trial court's permanency planning orders failed to make the requisite findings of fact to support its adjudication of the children as neglected and dependent.

After careful review, we affirm.

I. Factual and Procedural History

The evidence presented to the trial court tended to show the following:

Mother gave birth to Ava in Detroit, Michigan, on 4 January 2006. In 2007, Mother began a relationship with Father and, by the end of 2009, they had two children together, Robert and Riley, also born in Michigan. In the course of the parents' relationship, four reports were made to Michigan Child Protective Services for homelessness, domestic violence, substance abuse, and mental health issues; none of the reports resulted in intervention by the Michigan agency. Father was convicted at least three times for domestic violence, including two incidents involving Mother in 2007 and 2012; he was also convicted of concealed weapon offenses in 2003 and 2010.

Beyond domestic violence against Mother, Father also engaged in inappropriate physical disciplining of Ava and exposed the older three children to inappropriate sexual content. In August of 2012, Mother left Father and refused to allow him further contact with Robert and Riley; her departure rendered her and her children homeless. The next month, Mother gave birth to Abigail, appellants' third child in common, in Michigan.

Shortly after Abigail was born, on 31 October 2012, Mother filed a child support and custody action against Father as to Riley and Robert in the Circuit Court for Wayne County, Michigan (the "Michigan Action"). During the pendency of the Michigan Action and while the children were in Mother's custody, three more reports were made to Michigan Child Protective Services for neglect, physical abuse, and mental health issues; none of these reports resulted in intervention by the Michigan agency.

On 16 September 2013, the Michigan court awarded Mother sole legal and physical custody of Riley and Robert. Shortly after entry of the custody order in the Michigan Action, Mother fled the state with her four children to escape Father. Mother and the children settled in Guilford County, North Carolina.

Father filed a motion to modify the custody order in the Michigan Action on 4 October 2013. The Michigan court held an evidentiary hearing

on Father's motion on 16 April 2014 with Father present and Mother participating by phone. The Michigan court found that Father had not established grounds to regain custody, but granted Father supervised visitation rights in Winston-Salem, North Carolina, at his own expense.

Father never exercised the visitation rights awarded by the Michigan court in 2014. He has not seen Robert or Riley since 2012, when Robert was four and Riley was three. He has never met Abigail, who is now five.

Shortly after moving to North Carolina, Mother obtained housing assistance from Petitioner-Appellee Guilford County Department of Health and Human Services ("DHHS"), which paid her rent for three months. However, Mother was evicted in the fourth month for her failure to pay rent. Following her eviction, Mother was again living in homeless shelters with her children and became pregnant with twins by a third father in early 2014.

On 20 September 2014, DHHS received two reports concerning Mother, Abigail, Riley, Robert, and Ava. The reports indicated that Mother had slapped four-year-old Riley, resulting in charges of misdemeanor assault on a child under the age of twelve and misdemeanor child abuse. The reports also stated that Mother threatened to kill herself and her children. A mobile crisis unit evaluated Mother at the scene of the report. Mother was involuntarily committed to a local hospital for severe depression and suspected Post Traumatic Stress Disorder ("PTSD").

Two days later, DHHS filed a petition in Guilford County District Court alleging that Abigail, Riley, Robert, and Ava were abused, neglected, and dependent juveniles who should be removed from Mother's custody. DHHS was granted nonsecure custody as to all four children. The petition alleged that Mother "used cruel or grossly inappropriate devices or procedures to modify the behavior of a 4[-year old] child," that the children were living in an environment injurious to their welfare, that Mother could not provide proper care, supervision, or discipline, and that Mother could not arrange for appropriate alternative care for her children.

Mother was served with the petition on 25 September 2014 in open court during a hearing for continued nonsecure custody. Although DHHS personnel undertook diligent efforts prior to the hearing, they were unable to locate and serve Father with the petition. An adjudicatory hearing was scheduled for 20 November 2014.

Pending the adjudicatory hearing, Mother and DHHS agreed to a case plan requiring her to undergo parenting, psychological, psychiatric,

and substance abuse evaluations, to attend domestic violence counseling and parenting classes, and to secure stable housing. She was permitted visitation contingent upon a parenting/psychological evaluation and a meeting with DHHS personnel (termed a "TDM") consistent with the previously entered nonsecure custody orders. Consistent with the plan, Mother underwent all required evaluations between October and December 2014; she was diagnosed with Major Depressive Disorder, PTSD, and Alcohol Use Disorder. Mother's attendance at therapy and peer support programs was inconsistent, however, and she never enrolled in a group outpatient substance abuse program as recommended in her substance abuse evaluation.

On 12 November 2014, counsel for DHHS sent an email to District Court Judge Angela Foster notifying her of the custody order in the Michigan Action and noting the question of whether North Carolina could exercise jurisdiction over the children. Following a phone call with a judge in Michigan, Judge Foster called the adjudicatory hearing on the 20 November 2014 docket, but continued the hearing to allow the Michigan court time to enter an order relinquishing jurisdiction to North Carolina.

On 3 December 2014, following the telephone conference with Judge Foster, the Michigan court entered an order finding that "North Carolina is the more convenient and appropriate forum," and therefore the Michigan court declined and relinquished further jurisdiction over the custody actions concerning Riley, Robert, and Abigail to the North Carolina court.[2] The record does not indicate whether the Michigan court notified Father that it had relinquished jurisdiction to North Carolina.

The trial court held a pre-adjudication, adjudication and disposition hearing on 18 December 2014. Mother was present, as was a provisional attorney appointed by the court to represent Father's interests.[3] Mother consented to the adjudication of Abigail, Riley, Robert, and Ava as abused, dependent, and neglected. As memorialized by order filed

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2. It is unclear, based on the orders in the record from the Michigan court, whether Abigail was ever made subject to the Michigan Action; in any event, the Michigan court relinquished jurisdiction with respect to Abigail, Riley, and Robert.

3. Provisional counsel for Father was appointed pursuant to N.C. Gen. Stat. § 7B-1101.1 and consistent with the principle that "[p]arents have a right to counsel in all proceedings dedicated to the termination of parental rights." *In re L.C.*, 181 N.C. App. 278, 282, 638 S.E.2d 638, 641 (2007) (internal quotations omitted). There is no indication in the record that Father's provisional counsel was able to locate Father.

14 January 2015, the court acknowledged that the current plan for the four children was reunification, but found that Mother had not yet made sufficient progress on her case plan to order reunification.

On 30 January 2015, Mother delivered twins Diana and Oscar. DHHS filed juvenile petitions as to the twins alleging the newborn twins were neglected and dependent on the basis of the DHHS reports and criminal charges from September 2014 and the ongoing custody proceedings relating to Abigail, Riley, Robert, and Ava.[4]

DHHS personnel, Mother, Mother's therapists, and therapists for the children met concerning visitation on 11 February 2015. It was revealed at the meeting that Mother was not fully participating in therapy. As a result, the therapists recommended against visitation until Mother was more "fully engaged" in therapy and until recommended by the children's therapists.

The trial court held a 90-day review hearing concerning Abigail, Riley, Robert, and Ava on 12 March 2015. Counsel for Mother and provisional counsel for Father were present. DHHS personnel, despite diligent efforts to contact Father prior to the hearing, failed to locate and serve Father with notice of the hearing. Because Father had not been served with the juvenile petition or notice of any hearing, the provisional attorney for Father was released. The trial court acknowledged during the hearing that reunification remained the plan for the children, but found that Mother had not yet made sufficient progress as planned in her service agreement with DHHS.

The trial court held a permanency planning review on 7 May 2015. Neither Father nor counsel representing Father attended the hearing, and there is no indication that Father had received notice of the hearing. Mother attended the hearing with her live-in boyfriend, who had a criminal history of domestic violence. Following the presentation of testimony and other evidence, DHHS and the children's guardian ad litem recommended changing the plan from reunification to adoption in large part due to Mother's refusal to take public housing in favor of living with a man with a history of domestic violence against the recommendation of therapists, DHHS and the trial court, and despite her enrollment in a

4. Diana and Oscar were both adjudicated neglected and abused by consent of Mother, and the court ordered that reunification efforts cease at the same time it ordered that such efforts cease with respect to the other children. A recitation of the facts concerning the twins is not needed for disposition of this appeal, as Father's appeal concerns Abigail, Riley, and Robert only, and Mother's appellate brief asserts no specific argument regarding Diana or Oscar.

domestic violence education program. The trial court entered an order on 4 June 2015 changing the plan from reunification to adoption.

Mother continued to live with her boyfriend until August 2015, when she moved to Charlotte, North Carolina without informing DHHS. Mother's compliance with the DHHS case plan further declined following her move. She had ceased therapy in June 2015, and her enrollment in parenting classes was terminated for failure to cooperate with the program provider.

DHHS continued its efforts to locate Father, and in September 2015 found him living in Warren, Michigan. Father contacted DHHS for the first time on 9 September 2015, more than a year after the Michigan court had relinquished jurisdiction over the children to North Carolina. He stated that he loved his children, was unemployed and living with his sister, and disputed the facts of one of his domestic violence convictions.

Father called DHHS again on 14 September 2015, and learned that he would have to agree to a case plan with DHHS in order to reunify with his children, with visitation permitted only on the advice of the children's therapists. During the call, Father acknowledged to DHHS personnel that he had used marijuana one week prior and had been placed on probation for domestic violence against Mother while they were together in Michigan. A month after the call, DNA testing confirmed Father's paternity of Riley, Robert, and Abigail, and Father agreed to undergo a home study to facilitate reunification.

The trial court appointed an attorney for Father on 24 September 2015.

The trial court held another permanency planning review hearing on 19 November 2015. Mother and her attorney were present, as was Father's attorney. The trial court considered sworn testimony and written evidence, including a DHHS summary report identifying Father's lack of stable employment, lack of stable housing, lack of a bond with the children, illegal substance use, and domestic violence convictions as barriers to reunification. DHHS recommended that Father enter into a case plan if he wished to pursue reunification. Father's attorney requested a concurrent plan for reunification and that DHHS make reasonable efforts to assist Father. The trial court rejected that request based in part on Father's lack of a bond with the children. However, the court ordered that Father enter into a case plan with DHHS should he desire reunification. The court concluded that the primary permanent plan of adoption and termination of parental rights as to both Mother and Father remained in the best interests of the children and declined to disturb its 4 June 2015 order.

There is no indication in the record that Father or his attorney initiated contact with DHHS to develop a case plan for reunification following the hearing.

A third permanency planning review hearing was held on 10 March 2016. Mother and her attorney were present, as was Father's attorney. The trial court again received sworn testimony and written evidence in the form of court summaries from DHHS, the Guardian ad Litem, and Michigan DHHS.

A home study report by Michigan DHHS concerning Father's living arrangements concluded that there was no room in the home for Father, let alone children, and that the environment was not stable. The study also reported that Father had received no unemployment benefits for two months, and his only income was doing odd jobs. As a result, Michigan DHHS recommended against placement of the children with Father. Following notification of the home study results, Father stated he changed his living arrangements and moved in with his brother.

As for Mother, documentary evidence was introduced showing she had sought therapy and medication management for mental health issues from providers in Charlotte, although she had stopped attending both in November 2015. Despite her move to Charlotte, Mother remained in a romantic relationship with the boyfriend previously convicted of domestic violence offenses. DHHS recommended that adoption remain the primary placement plan with guardianship as the secondary plan, but also recommended that Father enter into and comply with a DHHS case plan in order to pursue reunification. The trial court took the matter under advisement.

On 23 March 2016, six months after Father was located by DHHS, in a telephone conference with his attorney and DHHS personnel, Father agreed in principle to a service agreement. On the call, Father acknowledged that he had choked Mother in 2012, but denied attempting to stab her.

Twelve days later, on 4 April 2016, before Father's service agreement was finalized, DHHS filed verified petitions to terminate Father's and Mother's parental rights. DHHS alleged in both petitions that termination of parental rights was appropriate for neglect under N.C. Gen. Stat. § 7B-1111(a)(1) (2015), willfully leaving the children in foster care for 12 months without reasonable progress under § 7B-1111(a)(2), willful failure to pay a reasonable portion of cost of care pursuant to § 7B-1111(a)(3), and incapability of providing care and supervision under § 7B-1111(a)(6). Mother and Father were served with their respective

petitions by certified mail on 11 and 14 April 2016, and both were served again personally on 21 April 2016.[5]

On 3 June 2016, the trial court entered an order—ruling on the issues it took under advisement in the March permanency planning hearing—concluding that adoption should remain the primary permanent plan. The court again ordered Father and DHHS to enter into a service agreement if Father wanted to seek reunification. Without referring directly to the petitions to terminate Mother's and Father's parental rights, the order required DHHS to continue pursuing termination.

The trial court heard evidence and argument on the petitions to terminate Mother's and Father's parental rights on 1-2 August 2016. Father did not attend the hearing; his attorney moved to allow him to appear via telephone because he was unable to attend in person. DHHS counsel objected on the grounds that Father's identity could not be verified via telephone and the hearing had been previously rescheduled for the explicit purpose of permitting Father to appear in person. The court denied Father's motion. DHHS voluntarily dismissed without prejudice its allegation that Father was incapable of caring for the children.

In the adjudicatory phase of the hearing, the trial court took judicial notice of the contents of the court file and heard testimony from Mother, a social worker assigned to the children, and an unlicensed "Peer Support Specialist" assisting Mother. The trial court found that DHHS had established by "clear, cogent, and convincing evidence" grounds to terminate Mother's and Father's parental rights.

In the dispositional phase, the trial court received the report of the guardian ad litem and heard testimony from the guardian ad litem program supervisor. The court determined that termination of parental rights was in the best interest of each of the children. The trial court's written order, entered 14 November 2016, concluded that grounds existed to terminate Mother's parental rights under N.C. Gen. Stat. §§ 7B-1111(a)(1) [abuse or neglect], (2) [lack of reasonable progress to correct conditions that led to petition], (3) [failure to pay for juvenile's cost of care], and (6) [incapability and dependency], to terminate Father's rights under N.C. Gen. Stat. §§ 7B-1111(a)(1) and (3), and that termination of parental rights was in the best interests of the children.

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5. Although Father had previously represented to DHHS that he had moved out of the home that had failed the home study in early 2016, he was served at that address by sheriff and certified mail on two separate dates.

Mother and Father appealed. Father also seeks certiorari review of the three Permanency Orders, having failed to identify them in his Notice of Appeal or state them in his Proposed Issues for Review on Appeal consistent with N.C. Gen. Stat. § 7B-1001(5)(a)(3).

II. Analysis

A. Father's Appeal

Father does not challenge any of the findings of fact or conclusions of law in the Termination Order. He contends, however, that the trial court lacked subject matter jurisdiction to determine his rights with respect to Riley, Robert, and Abigail and that the trial court violated his statutory rights to notice and due process. For reasons we will explain, we disagree.

1. Subject-Matter Jurisdiction

[1] North Carolina's Uniform Child Custody Jurisdiction and Enforcement Act ("UCCJEA"), N.C. Gen. Stat. § 50A-101 *et seq.*, governs the district court's subject-matter jurisdiction in child custody disputes. A trial court's jurisdiction pursuant to the UCCJEA is reviewed *de novo*. *In re J.H.*, ___ N.C. App. ___, ___, 780 S.E.2d 228, 233 (2015).

Michigan and North Carolina have codified the UCCJEA in virtually identical terms. N.C. Gen. Stat. § 50A-101 *et seq.*; Mich. Comp. Laws § 722.1101 *et seq*. Although North Carolina's district courts have original and exclusive jurisdiction over juvenile abuse, neglect, and dependency cases under N.C. Gen. Stat. § 7B-200(a), "the jurisdictional requirements of the UCCJEA . . . must also be satisfied for the court to have authority to adjudicate petitions filed pursuant to our juvenile code." *In re J.W.S.*, 194 N.C. App. 439, 446, 669 S.E.2d 850, 854 (2008) (citing *In re Brode*, 151 N.C. App. 690, 566 S.E.2d 858 (2002)). The UCCJEA recognizes four modes of subject-matter jurisdiction: (1) initial child-custody jurisdiction, N.C. Gen. Stat. § 50A-201; (2) exclusive, continuing jurisdiction, N.C. Gen. Stat. § 50A-202; (3) jurisdiction to modify determination, N.C. Gen. Stat. § 50A-203; and (4) temporary emergency jurisdiction, N.C. Gen. Stat. § 50A-204.

Temporary emergency jurisdiction exists "if the child is present in this State and . . . it is necessary in an emergency to protect the child because the child, or a sibling or parent of the child, is subjected to or threatened with mistreatment or abuse." N.C. Gen. Stat. § 50A-204(a). "A North Carolina court that does not have jurisdiction under N.C. Gen. Stat. §§ 50A-201 or 50A-203 has temporary emergency jurisdiction . . . ." *J.W.S.*, 194 N.C. App. at 449, 669 S.E.2d at 856. A district court need not

make findings of fact to exercise temporary emergency subject matter jurisdiction, *In re E.X.J.*, 191 N.C. App. 34, 40-41, 662 S.E.2d 24, 27-28 (2008), *aff'd per curiam*, 363 N.C. 9, 672 S.E.2d 19 (2009), and the entry of nonsecure custody orders is permitted thereunder provided the terms of § 50A-204(a) are satisfied. *In re J.H.*, ___ N.C. App. at ___, 780 S.E.2d at 237. Once a court exercising temporary emergency jurisdiction learns of a custody determination made in another state, however, it must communicate with the other state's court to resolve subject matter jurisdiction going forward because the other state exercises exclusive and continuing jurisdiction as a result of its prior order. N.C. Gen. Stat. §§ 50A-202, 50A-204, & 50A-110.

There is no dispute that the trial court had temporary emergency jurisdiction to enter nonsecure custody orders with respect to Riley, Robert, and Abigail: DHHS sought and procured the orders as a result of Mother's threats to kill herself and her children. But because the Michigan Action included a custody determination as to the juveniles,[6] the trial court could obtain subject matter jurisdiction over them only if North Carolina would otherwise have initial child custody jurisdiction under N.C. Gen. Stat. § 50A-201(a)(1) or (2) and if :

> (1) The court of the other state [Michigan] determines it no longer has exclusive, continuing jurisdiction under G.S. 50A-202 or that a court of this State would be a more convenient forum under G.S. 50A-207; or
>
> (2) A court of this State or a court of the other state determines that the child, the child's parents, and any person acting as a parent do not presently reside in the other state.

N.C. Gen. Stat. § 50A-203(a). N.C. Gen. Stat. § 50A-201(a)(1) provides for initial custody jurisdiction if "[t]his State is the home state of the child on the date of the commencement of the proceeding . . . ." The statute defines "home state" as that "in which a child lived with a parent . . . for at least six consecutive months immediately before the commencement of a child-custody proceeding," *id.* § 50A-102(7), and we determine a child's home state jurisdiction based on the physical location of a child and their parent. *In re K.U.-S.G.*, 208 N.C. App. 128, 134, 702 S.E.2d 103,

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6. Again, it is unclear from the record whether the Michigan Action included Abigail. Mother's petition for custody which initiated the Michigan Action did not mention Abigail, who was just one month old at that time. However, the Michigan court entered an order relinquishing jurisdiction with regard to Riley, Robert, and Abigail.

107 (2010). If a parent and her children are subject to the continuing and exclusive jurisdiction of another state's custody order, our courts acquire jurisdiction if the other state's court relinquishes jurisdiction consistent with N.C. Gen. Stat. § 50A-203(a) and if North Carolina is the children's "home state" as defined in N.C. Gen. Stat. § 50A-201(a)(1). *See also In re J.H*, __ N.C. App. __, __, 780 S.E.2d 228, 235-36 (2015) (applying this analysis to a North Carolina order modifying a Texas custody order).

Abigail, Riley, Robert, and Mother lived in North Carolina for more than a year prior to the trial court's hearing on pre-adjudication, adjudication, and disposition on 18 December 2014. Thus, North Carolina would qualify as the "home state" for the juveniles pursuant to N.C. Gen. Stat. § 50A-201(a)(1) and would have acquired initial custody jurisdiction but for the Michigan Action. Once the Michigan court determined North Carolina would be a more convenient forum and relinquished jurisdiction over the three children, the district court could assert jurisdiction under N.C. Gen. Stat. § 50A-203.

We will not disturb the trial court's assertion of jurisdiction based upon a facially valid order from another state ceding jurisdiction to this State. *See, e.g.*, *In re T.R.*, ___ N.C. App. ___, ___, 792 S.E.2d 197, 201 (2016) ("Nothing in the UCCJEA requires North Carolina's district courts to undertake a collateral review of a facially valid order from a sister state before exercising jurisdiction pursuant to N.C. Gen. Stat. § 50A-203(1).") (citation omitted).

2. Notice and Due Process

[2] Father raises the issue of notice and due process in several contexts relating to the UCCJEA,[7] asserting that "[t]he UCCJEA is clear that notice and a meaningful opportunity to participate in the jurisdictional decision are mandatory before jurisdiction can be relinquished." Father also argues "[t]he UCCJEA . . . requires that before a court determines it is an inconvenient forum . . . , it must allow the parties to submit information on the relevant factors the court must consider." (emphasis in original). Father's argument is misplaced.

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7. To the extent that Father contends his Constitutional rights to due process were violated prior to the termination hearing, we note that he was served with process and represented by counsel in the termination hearing and failed to raise any such arguments. Such arguments not raised at a termination hearing may not be raised for the first time on appeal. *In re T.P.*, 217 N.C. App. 181, 186, 718 S.E.2d 716, 719 (2011).

It was the Michigan court that determined it should relinquish jurisdiction to North Carolina, as is contemplated by the statute: "the original decree state is the sole determinant of whether jurisdiction continues." Official Comment to N.C. Gen. Stat. § 50A-202. To the extent that Father's due process rights were frustrated or denied, they were denied in Michigan, not North Carolina.

Father also argues that the UCCJEA and the North Carolina Juvenile Code required notice to him in order for the trial court to assert subject matter jurisdiction following its nonsecure custody orders and before the hearing adjudicating the children abused, neglected, and dependent, as he was never served with the juvenile petitions prior to said hearing. We have previously held, however, that "there is no legal basis for the . . . suggestion that the trial court lacked jurisdiction in the termination of parental rights proceeding because the father was not served with a summons in the initial adjudication proceeding." *E.X.J.*, 191 N.C. App. at 45, 662 S.E.2d at 31. The lack of service on Father prior to earlier custody and adjudication proceedings does not defeat the valid service and notice provided him for the termination hearing.

3. Petition for Writ of Certiorari

[3] Father's petition for certiorari challenging the trial court's three permanency orders argues there was insufficient evidence to support findings ceasing reunification efforts and further asserts that the trial court failed to make findings of fact required by N.C. Gen. Stat. §§ 7B-906.1 & 7B-906.2. But the Termination Order included findings—unchallenged by Father—that support cessation of reunification efforts, and the contents of termination orders cure defects in a prior permanency planning order. *In re L.M.T.*, 367 N.C. 165, 170, 752 S.E.2d 453, 456-57 (2013). *See also In re D.C.*, 236 N.C. App. 287, 292, 763 S.E.2d 314, 317-18 (2014) (concluding inadequate findings to support cessation of reunification efforts in a permanency planning order were cured by a later termination of parental rights order that "made additional detailed findings of fact . . . continuing up to the time of the hearing on termination of parental rights."). We also note that Father has failed to include the transcripts of the permanency planning hearings or request their inclusion via a motion to this Court pursuant to N.C. R. App. P. 9(b)(5)(b); we are obligated by the absence of the transcripts to consider the court's findings at those hearings as supported by competent evidence. *See Stone v. Stone*, 181 N.C. App. 688, 691, 640 S.E.2d 826, 828 (2007). We therefore deny Father's petition in our discretion.

B. Mother's Appeal

[4] By the plain text of the statute, termination of parental rights is permitted upon a finding of any *one* ground enumerated in N.C. Gen. Stat. § 7B-1111(a). The trial court in this action found four grounds existed as to Mother: (1) dependency; (2) abuse or neglect; (3) Mother's lack of reasonable progress to correct conditions that led to DHHS' petitions for custody; and (4) Mother's failure to pay for the cost of her children's care. Appellant challenges each of these grounds. However, because the trial court's findings were based on clear, cogent, and convincing evidence of dependency as defined in N.C. Gen. Stat. § 7B-1111(a)(6), we uphold the order terminating Mother's parental rights and do not reach her challenges regarding the other three grounds.

In reviewing findings of fact in a termination of parental rights order, we must determine "whether the trial court's findings of fact are based upon clear, cogent, and convincing evidence . . . ." *In re I.T.P-L.*, 194 N.C. App. 453, 461, 670 S.E.2d 282, 287 (2008) (citation omitted). If clear, cogent, and convincing evidence is present in the record to support a finding, it will not be disturbed, even in the face of evidence to the contrary. *In re Helms*, 127 N.C. App. 505, 511, 491 S.E.2d 672, 676 (1997). Legal conclusions drawn from the court's factual findings are reviewed *de novo*. *In re S.N.*, 194 N.C. App. 142, 146, 669 S.E.2d 55, 59 (2008). As for a determination by the trial court that termination is in the best interests of the child, we review for abuse of discretion where it is "manifestly unsupported by reason." *In re J.A.A.*, 175 N.C. App. 66, 75, 623 S.E.2d 45, 51 (2005).

Mother's sole challenge to the trial court's order finding the children dependent disputes a detailed finding of her history of mental illness and inconsistent treatment. Mother cites the lack of evidence showing the status of her mental health at the time of her hearing and points to the trial testimony of an unlicensed "Peer Support Specialist" that Mother's mental health had improved. As a result, Mother argues, "DHHS did not prove by clear and convincing evidence that the condition still rendered her incapable of parenting . . . ."

"[I]t [is] the trial court's responsibility to weigh the conflicting testimony and make appropriate findings of fact." *In re J.C.*, 236 N.C. App. 558, 562, 783 S.E.2d 202, 205 (2014). Here, there was ample documentary evidence and sworn testimony from a DHHS social worker from which the trial court could resolve any conflicting testimony by the Peer Support Specialist. While it is true that the last clinical assessment of Mother was approximately a year prior to the termination hearing, we

have previously held that a psychological evaluation conducted a year prior to a termination hearing can support the termination of parental rights where "the persistence of her personality problems characterized in her psychological evaluation as 'not easily amenable to change[,]' together with her lack of mental health treatment, constituted clear, cogent, and convincing evidence that her mental health problems had not changed significantly since the evaluation." *In re V.L.B.*, 168 N.C. App. 679, 685, 608 S.E.2d 787, 791 (2005). This was so irrespective of recent therapy. *Id.* at 685, 608 S.E.2d at 791.

The record here is sufficiently analogous to *V.L.B.* Mother's initial mental health assessment in October 2014 indicated that she suffered from recurring severe depression and PTSD. An assessment by a licensed psychologist two months later stated:

> [U]ntil she has better control over her depression and emotional neediness, she will continue to place herself and her children at risk for further harm. . . . [Mother] will need assistance. . . . At present, she is ill equipped emotionally and cognitively to accomplish [her treatment] goals independent of ongoing support, guidance, and therapy. . . . She needs medication to address her depressive symptomatology. And . . . she needs therapy to help her develop more effective coping strategies. . . .

Mother did not follow these recommendations. A year later, another mental health assessment indicated Mother continued to suffer from these same conditions and again recommended therapy. Following the second recommendation and prior to the termination hearing, Mother still did not participate in therapy, but instead misrepresented the status of her treatment to DHHS. Mother's longstanding mental health conditions and her repeated failures to follow recommendations for treatment necessary to care for her children safely constituted clear, cogent, and convincing evidence to support the trial court's findings of dependency.

[5] Mother next contends that the trial court abused its discretion in determining that termination of her parental rights would be in the best interests of Robert and Riley.[8] Mother challenges the findings that their likelihood of adoption remains high, that Robert is showing "great improvement" in foster care, and that Riley is in "a loving, nurturing, and

8. Mother concedes that the trial court did not err in concluding that termination of parental rights was in the best interests of the other minors.

safe environment." However, documentary evidence produced by the children's guardian ad litem notes that "[w]ith therapy, this GAL believes [Robert and Riley] will be able to be adopted. . . . [Robert] has a respectable bond with [redacted],[9] his caretaker. . . . [Robert] told this GAL he likes living with [redacted]." Further, the guardian ad litem supervisor testified at trial that "with the continuation of appropriate therapies, I believe that [Robert and Riley] will be adoptable," and that they had developed positive bonds with their caretakers. In light of this evidence, we cannot hold that the challenged findings were manifestly unsupported by reason.

Mother also contends that the likelihood of adoptability is low given Robert's and Riley's past behavioral problems and urges us to follow our decision in *In re J.A.O.*, 166 N.C. App. 222, 601 S.E.2d 226 (2004). That decision is inapposite. The teenage juvenile in *J.A.O.* had been in foster care for fourteen years, transferred caretakers nineteen times, lacked sufficient support, had a history of physical and verbal aggression, and suffered from a total of six medical conditions, both physical and mental. 166 N.C. App. at 227-28, 601 S.E.2d at 230. Indeed, the guardian ad litem in that case urged *against* adoption, and the mother "had made reasonable progress to correct the conditions that led to the petition to terminate her parental rights." *Id.* at 224-25, 601 S.E.2d at 228-29.

[6] Finally, Mother contends that the trial court's failure to make detailed findings concerning Robert and Riley's behavioral issues runs afoul of the "[a]ny relevant consideration" language of N.C. Gen. Stat. § 7B-1110(a)(6). However, the order does contain a finding addressing this behavior, stating that "[t]hey have behavioral issues related to the trauma they experienced prior to removal. With continued therapeutic treatment, the likelihood of their adoption remains high." Further, " '[t]he trial court is not required to make findings of fact on all the evidence presented, nor state every option it considered' in arriving at its disposition under N.C. Gen. Stat. § 7B-1110." *In re D.LW.*, 241 N.C. App. 32, 43, 773 S.E.2d 504, 511 (2015), *reversed in part on separate grounds*, 368 N.C. 835, 788 S.E.2d 162 (2016) (quoting *In re J.A.A.*, 175 N.C. App. 66, 75, 623 S.E.2d 45, 51 (2005)). Mother's argument on this point is overruled. As a result, we hold the trial court did not abuse its discretion in finding termination of Mother's parental rights was in the best interests of Robert and Riley.

9. The name of Robert's caretaker has been removed to protect his privacy.

IV. Conclusion

We hold that the district court properly exercised subject-matter jurisdiction regarding Father's parental rights on a temporary emergency basis and, once Michigan released continuing and exclusive jurisdiction over Father's children, under jurisdiction to modify a foreign court's determination. We further hold that despite Father's lack of notice of the initial custody proceedings, he was not denied due process in the termination proceeding because he was properly served with the petition and was represented by counsel in the proceeding. Finally, we hold that the district court did not err in its adjudication of the children or in its termination of Father's and Mother's parental rights.

AFFIRMED.

Chief Judge McGEE and Judge TYSON concur.

IN THE MATTER OF K.L. AND R.E.

No. COA17-80

Filed 5 July 2017

1. Child Abuse, Dependency, and Neglect—reunification efforts—statutory requirements

The trial court erred in a child neglect and dependency case by improperly ceasing reunification efforts with respondent mother prior to granting permanent custody of the children to their adult sibling. No evidence supported the finding that a change in the permanent plan was justified where the mother completed all required steps and completion of the final family therapy step was denied to her. Further, the court's findings did not satisfy the inquiry required under N.C.G.S. § 7B-906.1(d) where it merely adopted the findings in the previous court orders.

2. Child Abuse, Dependency, and Neglect—family therapy—placement with someone other than parent—additional findings necessary

The trial court erred in a child neglect and dependency case by concluding that "discharge" of the juveniles without family therapy having actually occurred provided support for the conclusion that returning the children to respondent mother within six months may

not have been possible or contrary to their best interests under N.C.G.S. § 7B-906.1(e) where further findings were needed before the children could be placed with their adult sibling.

3. Child Abuse, Dependency, and Neglect—assessment for changing legal custody—substantial change in circumstances—best interests of child

The trial court applied an incorrect standard of substantial change in circumstances in a child neglect and dependency case for assessing whether to change legal custody from an adult sibling of the children back to respondent mother where it should have used the best interests of the child standard under N.C.G.S. § 7B-906.1(i).

4. Child Abuse, Dependency, and Neglect—reunification efforts—findings from previous orders incorporated by reference

The trial court erred in a child neglect and dependency case by failing to make the inquiry required in N.C.G.S. § 7B-906.2 for reunification efforts where it merely incorporated by reference the findings contained in previous orders, and the Department of Social Services (DSS) conceded this error. Further, DSS offered no assistance or services to respondent mother since her notice was filed in the prior appeal and completely disregarded its statutory duty to "finalize the primary and secondary" plans until relieved by the trial court.

5. Child Abuse, Dependency, and Neglect—conclusion of law—unfit parent—constitutionally protected status as parent—responsibilities as parent

The trial court erred in a child neglect and dependency case by making a conclusion of law that respondent mother was unfit, acted inconsistently with her constitutionally protected status as a parent, and abdicated her responsibilities as a parent where no findings of fact in the trial court's order supported this conclusion.

6. Child Abuse, Dependency, and Neglect—waiver of further reviews—clear, cogent, and convincing evidence

The trial court erred in a child neglect and dependency case by waiving further reviews without clear, cogent, and convincing evidence of all five criteria under N.C.G.S. § 7B-906.1(n).

Appeal by respondent from order entered 12 May 2016 by Judge Toni S. King in Cumberland County District Court. Heard in the Court of Appeals 5 June 2017.

Christopher L. Carr for petitioner Cumberland County Department of Social Services and Beth A. Hall for guardian ad litem (joint brief).

Appellate Defender's Office, by Assistant Appellate Defender Annick Lenoir-Peek, for respondent-appellant.

TYSON, Judge.

Respondent-mother appeals from an order entered, which removed reunification as a concurrent permanent plan for her children, K.L. and R.E. We reverse and remand.

I. Background

This case returns to the Court for a second time. *In re K.L.*, __ N.C. App. __, 778 S.E.2d 104, 2015 WL 4898180 (unpublished). Cumberland County Department of Social Services ("DSS") filed a petition, which alleged Respondent-mother's children A.J., K.L. and R.E. were seriously neglected and dependent juveniles on 14 January 2014.

The allegations of neglect were asserted after DSS received reports alleging Respondent-mother had abused her autistic grandson, while he was in her care, and that her adult children also reported that she abused them as children. DSS voluntarily dismissed the allegations of serious neglect and dependency. Pursuant to stipulations between the parties, the trial court adjudicated the juveniles to be neglected at a hearing on 9 June 2014. A.J. has reached the age of majority and is no longer part of this case.

The trial court's disposition order retained physical and legal custody of the juveniles with DSS, and decreed for DSS to continue to make reasonable efforts towards reunification of the children with Respondent-mother. Following a hearing on 1 December 2014, the court entered a permanency planning order ("15 January 2015 order"). The court concluded the permanent plan was to place K.L. and R.E. into the custody of their married adult sibling ("Ms. E.") Respondent-mother appealed to this Court.

In her initial appeal, Respondent-mother argued the trial court had improperly ceased reunification efforts. She asserted no appropriate findings were made, as required by N.C. Gen. Stat. § 7B-906.1(e)(1), to explain why it would not be possible for K.L. and R.E. to be returned to her custody within the next six months. She also asserted the court

had not verified whether Ms. E. understood the legal significance of the custodianship pursuant to N.C. Gen. Stat. § 7B-906.1(j). *In re K.L.*, 2015 WL 4898180 at *4-5.

This Court held that the order appealed from did not show the trial court had ceased reunification efforts. The trial court's order specifically directed DSS to continue efforts to eliminate the need for continued placement of the juveniles outside of the home and DSS should continue efforts to reunify the juveniles with Respondent. *Id.* at *4.

This Court further held the trial court's 15 January 2015 order made minimally sufficient findings to comply with N.C. Gen. Stat. § 7B-906.1(e)(1) and (j). The case was remanded for the trial court to enter a specific visitation schedule with the juveniles. *Id.* at *5-8.

On 19 January 2016, a permanency planning hearing was held. On 12 May 2016, the court entered a subsequent permanency planning order which listed a visitation schedule, as required by this Court upon remand. The court also found that reasonable efforts to reunify the family would be futile, that the permanent plan was "previously achieved" and that legal and physical custody of K.L. and R.E. should remain with Ms. E. Respondent-mother again appeals to this Court.

II. Jurisdiction

Jurisdiction lies in this Court pursuant to N.C. Gen. Stat. § 7B-1001(a)(5) (2015).

III. Issues

Respondent-mother asserts the trial court improperly ceased reunification efforts and failed to follow statutory requirements, prior to granting permanent custody to Ms. E. Respondent-mother also argues the court violated the requirements of N.C. Gen. Stat. § 7B-906.1(n) and N.C. Gen. Stat. § 7B-905.1(d).

IV. Standard of Review

"This Court reviews an order that ceases reunification efforts to determine whether the trial court made appropriate findings, . . . whether the findings of fact support the trial court's conclusions, and whether the trial court abused its discretion with respect to disposition." *In re C.M.*, 183 N.C. App. 207, 213, 644 S.E.2d 588, 594 (2007). "An abuse of discretion occurs when the trial court's ruling is so arbitrary that it could not have been the result of a reasoned decision." *In re N.G.*, 186 N.C. App. 1, 10–11, 650 S.E.2d 45, 51 (2007) (citation and internal quotation marks omitted), *affirmed per curiam*, 362 N.C. 229, 657 S.E.2d 355 (2008). The

trial court's conclusions of law are reviewed *de novo* on appeal. *In re D.H.*, 177 N.C. App. 700, 703, 629 S.E.2d 920, 922 (2006) (citation omitted).

V. Ceasing Reunification Efforts

A. Purpose of Permanency Planning Hearing

Our Juvenile Code provides:

> Review hearings after the initial permanency planning hearing shall be designated as subsequent permanency planning hearings. The subsequent permanency planning hearings shall be held at least every six months thereafter or earlier as set by the court to review the progress made in finalizing the permanent plan for the juvenile, or if necessary, to make a new permanent plan for the juvenile.

N.C. Gen. Stat. § 7B-906.1(a) (2016).

This Court affirmed the 15 January 2015 order, which included a finding that DSS should continue reunification efforts and that custody with a relative to be the permanent plan. This Court concluded the trial court's permanency planning order did not cease reunification efforts. *In re K.L*, 2015 WL 4898180 at *4.

B. Statutory Requirements

1. N.C. Gen. Stat. § 7B-906.1(d)

[1] At each permanency planning hearing, the trial court "*shall* consider the following criteria and make written findings regarding those that are relevant:"

> (1) Services which have been offered to reunite the juvenile with either parent whether or not the juvenile resided with the parent at the time of removal or the guardian or custodian from whom the child was removed.
>
> (2) Reports on visitation that has occurred and whether there is a need to create, modify, or enforce an appropriate visitation plan in accordance with G.S. 7B-905.1.
>
> (3) Whether efforts to reunite the juvenile with either parent clearly would be unsuccessful or inconsistent with the juvenile's health or safety and need for a safe, permanent home within a reasonable period of time. The court *shall* consider efforts to reunite regardless of whether the juvenile resided with the parent, guardian, or custodian at

> the time of removal. If the court determines efforts would be unsuccessful or inconsistent, the court *shall* consider other permanent plans of care for the juvenile pursuant to G.S. 7B-906.2.
>
> (4) Reports on the placements the juvenile has had, the appropriateness of the juvenile's current foster care placement, and the goals of the juvenile's foster care plan, including the role the current foster parent will play in the planning for the juvenile.
>
> (5) If the juvenile is 16 or 17 years of age, a report on an independent living assessment of the juvenile and, if appropriate, an independent living plan developed for the juvenile.
>
> (6) When and if termination of parental rights should be considered.
>
> (7) Any other criteria the court deems necessary.

N.C. Gen. Stat. § 7B-906.1(d) (2016) (emphasis supplied).

The trial court's order is required to "make [it] clear that the trial court considered the evidence in light of whether reunification would be futile or would be inconsistent with the juvenile's health, safety, and need for a safe, permanent home within a reasonable period of time. The trial court's written findings must address the statute's concerns." *In re L.M.T.*, 367 N.C. 165, 167–68, 752 S.E.2d 453, 455 (2013) (quotation marks omitted).

At the 19 January 2016 permanency planning hearing, DSS social worker Stacy Williams testified and DSS offered her report into evidence. Ms. Williams testified her recommendation was to close the case. She admitted DSS had not been working toward the juveniles' reunification with Respondent-mother. Ms. Williams acknowledged DSS had offered no services to Respondent-mother, since the entry of her prior notice of appeal in January 2015.

The court made no specific inquiry or findings regarding visitations which had already occurred. The DSS social worker testified only that the agreed upon visitation schedule included unsupervised overnight visits.

The trial court made the following finding:

> 14. That the Court finds that reasonable efforts to reunify the family would be futile and inconsistent with the

> juveniles health, safety, and need for a safe, permanent home within a reasonable period of time.

No record evidence shows any basis to support such a finding.

The trial court found Respondent-mother had completed "many Court ordered services," except family therapy, which had not been offered, prior to the permanency planning hearing. The court also found, "there has not be a substantial change in circumstances since the entry of the December 1, 2014 Permanency Planning Order."

Further hearings had been continued seven times since the 1 December 2014 hearing. No permanency planning hearing had been held since 1 December 2014. The court released the guardian *ad litem* on 8 December 2014, prior to Respondent's entry of her notice of appeal from the 15 January 2015 order.

DSS made no efforts to recommend or provide services under the ordered concurrent plan of reunification. No evidence supports and DSS cannot now assert that a change in the permanent plan was justified, based upon Respondent-mother's failure to complete steps necessary to reunify with her children, when she had completed all required steps and completion of the final family therapy step was denied to her.

The order addresses the success of the juveniles' placement with their sibling, Ms. E. The remaining statutory factors in N.C. Gen. Stat. § 7B-906.1(d) are inapplicable to the present case. However, the court's findings do not satisfy the multiple layers of inquiry and conclusions as are required by our Juvenile Code.

We reject DSS' argument that by adopting the findings in the previous court orders, the trial court accomplished its statutory duty of making findings pursuant to N.C. Gen. Stat. § 7B-906.1(d). These prior findings were the basis of the disposition order, which provided custody with Ms. E. as the primary plan, and also required reunification efforts with Respondent-mother to continue. To subsequently remove reunification as a concurrent permanent plan requires properly admitted evidence to support findings of fact to allow the court to conclude "efforts to reunite the juvenile with either parent clearly would be futile or inconsistent with the juvenile's health or safety and need for a safe, permanent home within a reasonable period of time." N.C. Gen. Stat. § 7B–906.1(d)(3).

Upon remand, no additional evidence was presented or admitted to support the trial court's finding that "efforts to reunite the family would be unsuccessful or inconsistent with the juvenile's health or safety, and

need for a safe, permanent home within a reasonable period of time." Without additional evidence and proper findings of fact in support, the trial court's conclusion to cease reunification efforts must be vacated.

2. N.C. Gen. Stat. § 7B-906.1(e)

[2] At any permanency planning hearing *where the juvenile is not placed with a parent*, the court *shall* additionally consider the following criteria and make written findings regarding those that are relevant:

> (1) Whether it is possible for the juvenile to be placed with a parent within the next six months and, if not, why such placement is not in the juvenile's best interests.
>
> (2) Where the juvenile's placement with a parent is unlikely within six months, whether legal guardianship or custody with a relative or some other suitable person should be established and, if so, the rights and responsibilities that should remain with the parents.
>
> (3) Where the juvenile's placement with a parent is unlikely within six months, whether adoption should be pursued and, if so, any barriers to the juvenile's adoption.
>
> (4) Where the juvenile's placement with a parent is unlikely within six months, whether the juvenile should remain in the current placement, or be placed in another permanent living arrangement and why.
>
> (5) Whether the county department of social services has since the initial permanency plan hearing made reasonable efforts to implement the permanent plan for the juvenile.
>
> (6) Any other criteria the court deems necessary.

N.C. Gen. Stat. § 7B-906.1(e) (2015) (emphasis supplied).

The trial court concluded that return of the juvenile to Respondent-mother's custody "would be contrary to the welfare and best interest of the juvenile[s]." Respondent-mother argues the trial court failed to make the relevant inquiries required by N.C. Gen. Stat. § 7B-901.1(e) when a child is not placed with a parent.

This Court addressed a similar argument in Respondent's previous appeal. We held that evidence in the record minimally supported the

trial court's finding, "[t]hat return of the juveniles would be contrary to the welfare and best interests of the juveniles inasmuch as the juveniles are in need of more adequate care and supervision than can be provided by [Respondent-mother] at this time and [Respondent-mother is] in need of additional services." *In re K.L.*, 2015 WL 4898180 at *5.

This Court's prior opinion further specified that Respondent-mother's psychological assessment recommended she participate in family counseling and that the juveniles' therapist should determine when such therapy was appropriate. In December 2014, DSS informed the court that the juveniles' therapist believed "that the children were not ready to engage in family therapy at this time."

At the January 2016 hearing, DSS social worker Williams testified "the last service the Respondent-mother was supposed to complete" was family therapy. Ms. Williams testified she had "spoken to the therapist on several different occasions" and the therapist indicated "it was not a good time to have [Respondent-mother] in therapy sessions." She also stated the juveniles were no longer in regular therapy sessions. She indicated the therapist "really didn't have an opinion" on the children spending more time with their mother, because she had not met Respondent-mother.

In the order currently before us, the trial court found the juveniles' therapist had "discharged" them from therapy services, while also finding that it had previously "found that Respondent-mother and the juveniles should engage in therapy."

While this "discharge" of the juveniles without the family therapy having actually occurred is questionable, this finding provides minimal support for the conclusion that returning K.L. and R.E. to Respondent-mother within six months may not have been possible or contrary to their best interests. Upon remand and at future permanency planning hearings, the trial court should further inquire whether family therapy remains necessary. If not, it should be removed from the plan as a step Respondent-mother is to accomplish.

3. N.C. Gen. Stat. § 7B-906.1(i)

[3] Respondent asserts the trial court applied the incorrect standard in assessing whether or not to change legal custody from Ms. E. back to Respondent-mother. As this issue needs to be addressed on remand, we agree.

Here, the trial court found there had not been "a substantial change in circumstances" since the 15 January 2015 order providing Ms. E.

primary custody of K.L. and R.E. "Substantial change in circumstances" is the legal test to review a change of custody between two parties in a Chapter 50 civil custody action.

DSS argues the present case is controlled by *In re A.C.*, __ N.C. App. __, 786 S.E.2d 728 (2016). In the case of *In re A.C.*, the trial court had previously, by written order, awarded the respondent-mother sole legal and physical custody of A.C. *Id.* at __, 786 S.E.2d at 733. In the same written order, the court had waived further review hearings and relieved DSS of its responsibilities. *Id.* at __, 786 S.E.2d at 732.

The trial court in *In re A.C.* had not entered a civil custody order pursuant to N.C. Gen. Stat. § 7B–911, but expressly retained juvenile court jurisdiction pursuant to N.C. Gen. Stat. § 7B–201. *Id.* at __, 786 S.E.2d at 733.

After receiving sole custody, the respondent-mother left A.C. in the care of A.C.'s aunt. The aunt filed a "Motion to Reopen, Motion to Intervene, and Motion in the Cause for Child Custody" within the juvenile proceeding. The motion alleged "a substantial change in circumstances" since the earlier order had granted respondent-mother sole custody of A.C. *Id.* at __, 786 S.E.2d at 732. The court conducted a hearing on the aunt's motion to modify custody and entered a "Review Order" granting aunt "the sole legal and physical custody of [A.C.]" *Id.* at __, 786 S.E.2d at 732. Our Court held "the court was obliged to resolve a custody dispute between a parent and a nonparent in the context of a proceeding under Chapter 7B." *Id.* at __, 786 S.E.2d at 733.

Because the trial court had allowed A.C.'s aunt and caretaker to intervene and seek custody of A.C. from the respondent-mother after custody had been awarded to the respondent-mother, the appellate court's review of the trial court's review order awarding custody to the aunt as intervenor also required "recourse to legal principles typically applied in custody proceedings under N.C. Gen. Stat. Chapter 50, in addition to those governing abuse, neglect, and dependency proceedings under Chapter 7B." *Id.* at __, 786 S.E.2d at 733. "[O]nce the custody of a minor child is judicially determined, that order of the court cannot be modified until it is determined that (1) there has been a substantial change in circumstances affecting the welfare of the child; and (2) a change in custody is in the best interest of the child." *Id.* at __, 786 S.E.2d at 742 (citing *Hibshman v. Hibshman*, 212 N.C. App. 113, 121, 710 S.E.2d 438, 443 (2011) (citation and ellipsis omitted)).

The trial court in *In re A.C.*, was controlled by N.C. Gen. Stat. § 7B-1000(a) (2015) which provides that the "court may modify or vacate

the order in light of changes in circumstances or the needs of the juvenile." *See id.* at __, 786 S.E.2d at 734. This Court held "the burden fell upon intervenor to demonstrate 'changes' warranting a modification of the custody arrangement established by the . . . review order." *Id.* at __, 786 S.E.2d at 734. Further, "such changes must have either occurred or come to light subsequent to the establishment of the *status quo* which [aunt] sought to modify." *Id.* at __, 786 S.E.2d at 734 (citation omitted).

The trial court in *In re A.C.* had previously relieved DSS of further duties and waived further review hearings. The court modified its previous award of custody in response to a "Motion to Reopen, Motion to Intervene and Motion in the Cause." *Id.* at __, 786 S.E.2d at 732.

Here, the parties were before the trial court at a subsequent permanency planning review hearing after remand from this Court. At this subsequent permanency planning hearing, the trial court appears to have attempted to cease reunification efforts based upon a lack of substantial change in circumstances since the entry of the previous order. The analysis in *In re A.C.* is inapplicable. Respondent-mother was not required to show a substantial change in circumstances to retain the concurrent plan of reunification.

This Court's decision in *In re J.S.*, __ N.C. __, 792 S.E.2d 861 (2016) is relevant here. "The plain language of § 7B–1000(a) states that it is applicable to an order entered after a review hearing at which the trial court considers whether to modify or vacate a previously entered order 'in light of changes in circumstances or the needs of the juvenile.' " *Id.* at __, 792 S.E.2d at 863. The permanency planning order in *In re J.S.* stated it was "entered pursuant to N.C. Gen. Stat. § 7B–906.1." *Id.* at __, 792 S.E.2d at 864. We held "that entry of a permanency planning order is governed by N.C. Gen. Stat. § 7B–906.1 and not by N.C. Gen. Stat. § 7B–1000." *Id.* at __, 792 S.E.2d at 864. Here the court's order is titled, "Permanency Planning Order" and indicates the "hearing is being held pursuant to N.C. Gen. Stat. § 7B-906.1(e)."

At a permanency planning hearing:

> (i) The court may maintain the juvenile's placement under review or order a different placement, appoint a guardian of the person for the juvenile pursuant to G.S. 7B-600, or order any disposition authorized by G.S. 7B-903, including the authority to place the child in the custody of either parent or any relative found by the court to be suitable and found by the court to be in the best interests of the juvenile.

N.C. Gen. Stat. § 7B-906.1(i) (2016).

Neither Respondent-mother nor DSS need show a "substantial change in circumstances" to seek modification under the statute. The trial court was required to address custody and reunification as permanent plans and to consider the best interest of the juveniles. The trial court found it was "in the best interests of [the juveniles] that permanent legal and physical custody remain" with Ms. E.

The trial court conflated the requirements of Chapters 50 and 7B and included an unnecessary and improper test of "substantial change in circumstances" at this stage of permanency planning. It is unclear from the brief transcript and minimal findings whether the inclusion of this erroneous standard impacted the permanent plan ordered by the court. Upon remand the court is to review the permanent plans of custody with a relative and reunification with Respondent-mother under only the correct statutory standard set forth in § 7B-906.1(i).

4. N.C. Gen. Stat. § 7B-906.2

[4] Respondent-mother contends the trial court failed to make the inquiry required in N.C. Gen. Stat. § 7B-906.2. DSS concedes N.C. Gen. Stat. § 7B-906.2 is applicable since the case was pending on 1 October 2015.

a. § 7B-906.2(b)

N.C. Gen. Stat. § 7B-906.2(b) requires reunification remain a primary or secondary plan, unless the court makes the requisite findings of fact showing that reunification efforts clearly would be unsuccessful or would be inconsistent with the juvenile's health or safety. N.C. Gen. Stat. § 7B-906.2(b) (2016). DSS argues the trial court's order complied with § 7B-906.2(b) by incorporating by reference the findings contained in previous orders.

Rule 52 of the Rules of Civil Procedure requires that in all actions tried upon the facts without a jury, "the court shall find the facts specially and state separately its conclusions of law . . . ." N.C. Gen. Stat. § 1A-1, Rule 52(a)(1) (2015). The documents incorporated may support a finding of fact; however, merely incorporating the documents by reference is not a sufficient finding of fact.

"[A] proper finding of facts requires a specific statement of the facts on which the rights of the parties are to be determined, and those findings must be sufficiently specific to enable an appellate court to review the decision and test the correctness of the judgment." *Quick v. Quick*, 305 N.C. 446, 451, 290 S.E.2d 653, 657 (1982).

Findings of fact must show that the trial court has reviewed the evidence presented and found the facts through a process of logical reasoning. *In re O.W.*, 164 N.C. App. 699, 702, 596 S.E.2d 851, 853 (2004) ("the trial court must, through 'processes of logical reasoning,' based on the evidentiary facts before it, 'find the ultimate facts essential to support the conclusions of law.' ") (quoting *In re Harton*, 156 N.C. App. 655, 660, 577 S.E.2d 334, 337 (2003)).

This Court has repeatedly stated that "the trial court's findings must consist of more than a recitation of the allegations" contained in the juvenile petition. *In re O.W.*, 164 N.C. App. at 702, 596 S.E.2d at 853; *Coble v. Coble*, 300 N.C. 708, 712, 268 S.E.2d 185, 189 (1980) ("The requirement for appropriately detailed findings is thus not a mere formality or a rule of empty ritual; it is designed instead 'to dispose of the issues raised by the pleadings and to allow the appellate courts to perform their proper function in the judicial system.' " (citation omitted)).

Here, the trial court's unsupported conclusory statement that "reasonable efforts to reunify the family would be futile and inconsistent with the juveniles' health [or] safety" does not meet the statutory or prior case law's requirements and must be vacated.

b. § 7B-906.2(d)

N.C. Gen. Stat. § 7B-906.2(d) requires the court make specific written findings as to each of the following, "which shall demonstrate [the parent's] lack of success":

> (1) Whether the parent is making adequate progress within a reasonable period of time under the plan.
>
> (2) Whether the parent is actively participating in or cooperating with the plan, the department, and the guardian ad litem for the juvenile.
>
> (3) Whether the parent remains available to the court, the department, and the guardian ad litem for the juvenile.
>
> (4) Whether the parent is acting in a manner inconsistent with the health or safety of the juvenile.

Here, the trial court's order contains a finding of fact that prior to the initial appeal, Respondent-mother completed many "Court ordered services." No other finding mentions Respondent-mother's progress, shortcomings, or failures to accomplish, with respect to the permanent plan.

Unchallenged testimony shows DSS had offered no assistance or services to Respondent-mother since her notice was filed in the prior appeal.

The court's order makes no mention of Respondent-mother's cooperation or lack of cooperation with DSS. Ms. Williams, DSS' only witness at the hearing, offered no testimony in this regard.

Respondent-mother testified at the hearing she remained willing to "do whatever that was asked of her" and that she had completed all of the other services and steps DSS had asked her to complete. She testified she had not been asked to do anything since January 2015. DSS did not cross-examine Respondent-mother nor offer any rebuttal evidence to refute her testimony.

c. § 7B-906.2(c)

N.C. Gen. Stat. § 7B-906.2(c) provides that "[i]n every subsequent permanency planning hearing," "the court shall make written findings" about the efforts DSS has made towards achieving the primary and secondary plans in effect prior to the hearing. The trial court made no findings of whether DSS had made reasonable efforts to reunite Respondent with her children.

The trial court's order "must make [it] clear that the trial court considered the evidence in light of whether reunification would be futile or would be inconsistent with the juvenile's health, safety, and need for a safe, permanent home within a reasonable period of time." *In re A.E.C.*, 239 N.C. App. 36, 42, 768 S.E.2d 166, 170 (2015), *cert. allowed*, __ N.C.__, 796 S.E.2d 791 (2017). While the written findings do not need to quote the exact language of the statute, the trial "court's written findings must address the statute's concerns." *Id.*

As stated previously, Ms. Williams testified DSS had provided no reunification efforts following the 15 January 2015 order. The record on appeal shows DSS completely disregarded its statutory duty to "finalize the primary and secondary" plans until relieved by the trial court. *See* N.C. Gen. Stat. § 7B-906.2(b).

This Court cannot infer from the minimal findings that reunification efforts would be futile or inconsistent with the juveniles' health or safety. *See In re A.E.C.*, 239 N.C. App. at 43, 768 S.E.2d at 171. *See also*, *In re T.W.* __ N.C. App. __, __, 796 S.E.2d 792, 795-96 (2016) (holding "if reunification efforts are not foreclosed as part of the initial disposition pursuant to N.C. Gen. Stat. § 7B–901(c), the court may eliminate reunification as a goal of the permanent plan only upon a finding made under N.C. Gen. Stat. § 7B–906.2(b). Only when reunification is eliminated

from the permanent plan is the department of social services relieved from undertaking reasonable efforts to reunify the parent and child.").

The trial court's conclusion of law that reunification would be futile is error without any evidence in the record to support the findings of fact. *In re J.T.*, __ N.C. __, __, 796 S.E.2d 534, 536 (2017). We reverse the trial court's order as it relates to cessation of reunification efforts.

C. Constitutionally Protected Status

[5] Respondent also argues the trial court's conclusion of law that she is unfit, has acted inconsistently with her constitutionally protected status as a parent, and has abdicated her responsibilities as a parent is completely unsupported by any finding of fact. We agree.

The trial court must clearly "address whether respondent is unfit as a parent or if her conduct has been inconsistent with her constitutionally protected status as a parent, should the trial court . . . consider granting custody or guardianship to a nonparent." *In re P.A.*, 241 N.C. App. 53, 66–67, 772 S.E.2d 240, 249 (2015).

Findings in support of the conclusion that a parent acted inconsistently with the parent's constitutionally protected status are required to be supported by clear and convincing evidence. *See Adams v. Tessener*, 354 N.C. 57, 63, 550 S.E.2d 499, 503 (2001) (holding that "a trial court's determination that a parent's conduct is inconsistent with his or her constitutionally protected status must be supported by clear and convincing evidence" (citing *Santosky v. Kramer*, 455 U.S. 745, 747-48, 71 L. Ed. 2d 599, 603 (1982)).

"The clear and convincing standard requires evidence that should fully convince. This burden is more exacting than the preponderance of the evidence standard generally applied in civil cases, but less than the beyond a reasonable doubt standard applied in criminal matters." *In re A.C.*, __ N.C. at __, 786 S.E.2d at 734 (citing *Scarborough v. Dillard's, Inc.*, 363 N.C. 715, 721, 693 S.E.2d 640, 643 (2009), *cert. denied*, 563 U.S. 988, 179 L.Ed.2d 1211 (2011)).

This Court's inquiry must be "whether the evidence presented is such that a [fact-finder] applying that evidentiary standard could reasonably find the fact in question." *Id.* at __, 786 S.E.2d at 734 (internal quotation marks and citations omitted).

No findings of fact in the trial court's order addresses, whether Respondent-mother was unfit or how she was acting inconsistently with her protected status as a parent at the time of the hearing. The trial court's conclusion is unsupported by findings of fact.

We reverse the order awarding permanent custody to Ms. E. and remand. Upon remand, the district court must "address whether respondent is unfit as a parent or if her conduct has been inconsistent with her constitutionally protected status as a parent." *In re P.A.*, 241 N.C. App. at 66, 772 S.E.2d at 249. In light of the lack of any services offered by DSS since Respondent-mother's notice in the prior appeal, further evidence should be taken and proper findings of fact supported by the required evidentiary standard and burden must be made to support the conclusions of law. *See id.*

VI. N.C. Gen. Stat. §§ 7B-906.1(n) and 7B-905.1(d)

[6] Respondent-mother argues the trial court committed reversible error when it waived holding further reviews. We agree.

The trial court may not waive permanency planning hearings unless "the court finds by *clear*, *cogent*, *and convincing evidence each* of the following":

> (1) The juvenile has resided in the placement for a period of at least one year.
>
> (2) The placement is stable and continuation of the placement is in the juvenile's best interests.
>
> (3) Neither the juvenile's best interests nor the rights of any party require that review hearings be held every six months.
>
> (4) All parties are aware that the matter may be brought before the court for review at any time by the filing of a motion for review or on the court's own motion.
>
> (5) The court order has designated the relative or other suitable person as the juvenile's permanent custodian or guardian of the person.

N.C. Gen. Stat. § 7B-906.1(n) (2016) (emphasis supplied).

Our statutes and cases require the trial court to address all five criteria, make findings of fact to support its conclusion, and hold its failure to do so is reversible error. *In re P.A.*, 241 N.C. App. at 66, 772 S.E.2d at 249 ("The trial court must make written findings of fact satisfying each of the enumerated criteria listed in N.C. Gen. Stat. § 7B–906.1(n), and its failure to do so constitutes reversible error."). *See also In re L.B.*, 184 N.C. App. 442, 447, 646 S.E.2d 411, 413–14 (2007) (construing predecessor statute, N.C. Gen. Stat. § 7B–906(b) (2005)).

DSS concedes the trial court failed to comply with these mandatory provisions of the statute. DSS asserts even though the exact language was not set forth in the court's order, "it is clear that it was the intent of the trial court." It is not the role of the appellate court to try to interpret "the intent of the trial court."

The trial court failed to specifically address whether the juveniles best interests or a right of a party required reviews every six months under the third prong of § 7B-906.1(n) and failed to make any finding at all regarding the fourth requirement. That portion of the trial court's order purporting to end judicial review hearings in this case is reversed for lack of supported and written findings of fact on all five criteria set forth in N.C. Gen. Stat. § 7B-906.1(n).

VII. Conclusion

The Juvenile Code's requirements must be followed prior to making a supported conclusion whether to grant Ms. E. permanent custody of K.L. and R.E. We reverse and remand for additional findings in accordance with N.C. Gen. Stat. § 7B-906.2 before reunification with Respondent-mother as a goal of the permanent plan can be eliminated.

Upon remand, the trial court must also make inquiry and enter necessary findings according to N.C. Gen. Stat. §§ 7B-906.1(n) and 905.1(d) before further review hearings may be waived.

The order appealed from is vacated in part and reversed in part. This cause is remanded to the district court for further proceedings as are consistent with this opinion. *It is so ordered.*

VACATED IN PART; REVERSED IN PART AND REMANDED.

Chief Judge McGEE and Judge INMAN concur.

IN RE T.P., T.P. AND T.P., THREE MINOR JUVENILES

No. COA17-119

Filed 5 July 2017

Child Abuse, Dependency, and Neglect—removal of juvenile custody from parent—verified petition required—new adjudicatory hearing required

The trial court lacked subject matter jurisdiction to adjudicate new allegations of abuse, neglect, or dependency that fell within the parameters of N.C.G.S. § 7B-401(b) even though it had stated in a prior order that it was retaining jurisdiction. Because N.C.G.S. § 7B-401(b) was triggered, the Department of Social Services was required to file a verified petition seeking an adjudication of the juveniles and the trial court was then required to conduct an adjudicatory hearing.

Appeal by respondent from order entered 24 October 2016 by Judge H. Thomas Church in Iredell County District Court. Heard in the Court of Appeals 7 June 2017.

Lauren Vaughan for petitioner-appellee Iredell County Department of Social Services.

Melanie Stewart Cranford for guardian ad litem.

Appellate Defender Glenn Gerding, by Assistant Appellate Defender Joyce L. Terres, for respondent.

DAVIS, Judge.

T.P.[1] ("Respondent") appeals from the trial court's 24 October 2016 order placing her three children in the custody of the Iredell County Department of Social Services ("DSS") based on a report of abuse, neglect, or dependency that DSS had received from law enforcement officers. At the time this report was received, the court had previously discontinued periodic judicial reviews and released counsel in connection with proceedings stemming from a prior adjudication of the children as abused juveniles. On appeal, Respondent argues that the court

1. Pseudonyms and initials are used throughout this opinion to protect the identity of the juveniles and for ease of reading.

(1) lacked subject matter jurisdiction to enter the 24 October 2016 order; and (2) erred by failing to conduct an adjudicatory hearing pursuant to Article 8 of the Juvenile Code.

This appeal requires us to consider how a trial court obtains subject matter jurisdiction to enter an order removing the custody of juveniles from their parent in a proceeding governed by N.C. Gen. Stat. § 7B-401(b). After careful review, we vacate the trial court's order for lack of subject matter jurisdiction.

Factual and Procedural Background

"Tasha," "Tina," and "Tyler" are Respondent's children from three different fathers — G.P, P.S, and E.K.[2] On 25 August 2015, DSS filed three verified petitions alleging abuse and neglect of Tasha, Tina, and Tyler. On 20 October 2015, an adjudication hearing was held in Iredell County District Court before the Honorable H. Thomas Church. Following the hearing, the trial court entered an order adjudicating the three children to be abused. On 17 November 2015, a dispositional hearing was held, and the trial court issued an order on 1 December 2015 placing the three children in the custody of DSS. Pursuant to the trial court's order, permanency planning hearings were subsequently held every 90 days.

Following a 6 September 2016 permanency planning hearing, the trial court entered an order on 7 September 2016 determining that Respondent was "fit and proper to exercise the care, custody, and control of the juveniles" and ordering that "[t]he legal and physical custody of the juveniles . . . shall be returned to Respondent Mother." P.S. was given joint legal and physical custody of Tina. G.P. and E.K. were allowed supervised visits with their children. The 7 September 2016 order stated that the court was "retain[ing] jurisdiction" but determined that "no further regular review hearings are scheduled." The order also provided that DSS "is relieved of active monitoring responsibility, the Guardian *ad Litem* Program is relieved, and all counsel is [sic] relieved."

On 14 September 2016, DSS received a new Child Protective Services report stating that law enforcement officers had responded to a domestic altercation two days earlier between Respondent and E.K. On 15 September 2016, a DSS social worker met with Respondent, who admitted that the altercation had occurred and that same day signed a safety plan in which she agreed to obtain a domestic violence protective order ("DVPO") against E.K. Based on its investigation of the incident,

2. None of the fathers are parties to this appeal.

DSS determined that immediate removal of the minor children from Respondent's custody was not required.

On 16 September 2016, DSS filed a "Motion for Review" in the existing juvenile matters as to each of the three children, requesting the trial court "to hear and further consider the case" due to a "[c]hange in situation." The motions detailed the 14 September report from law enforcement officers, the social worker's meeting with Respondent, and the safety plan to which Respondent had agreed. The motions further stated that Respondent had denied that any of the children were present during the altercation but that E.K. had indicated to law enforcement officers that his son had, in fact, been present. The motions also asserted that Respondent had "stated that she was not going to [seek a DVPO], because she was going to move out of the county." On 3 October 2016, DSS filed a "Juvenile Court Summary" stating, in pertinent part, that despite the safety plan Respondent had signed in which she agreed that she would obtain a protective order against E.K., she had failed to follow through by actually obtaining the DVPO.

On 4 October 2016, the trial court held a hearing on the Motions for Review. The social worker, Respondent, and E.K. testified regarding the events of 12 September 2016. DSS recommended that "legal and physical custody of [Tasha] and [Tyler] be placed with [DSS] with [DSS] having placement authority" and that "legal and physical custody of [Tina be placed] with Respondent Father [P.S.]" On 24 October 2016, the court entered an order containing the following pertinent findings of fact:

> 3. This case came on for a Motion for Review filed September 16, 2016, by DSS and a Permanency Planning Review, the above-named juveniles having been found within the jurisdiction of the court as abused on October 20, 2015. The current allegations involve a physical assault that occurred on or about September 12, 2016, between Respondent Mother and [E.K.] in which it is alleged they have been violating Orders of this Court regarding visitation with [E.K.] and that the minor, [Tyler], was present during the altercation.
>
> 4. The report of the social worker, which is attached hereto, shall be admitted into evidence and incorporated herein by reference as this Court's findings of fact. Additionally, the Court takes judicial notice of the facts from prior orders entered in this matter and incorporates the same herein by reference. This Court has also

> considered the Motion for Review and Petitioner's #1 which is the police incident report.
>
> . . . .
>
> 6. The allegations in the Motion for Review are consistent with the police report, testimony from the social worker, and the reluctant admission from Respondent Mother that a physical assault did occur. Therefore this Court finds that those allegations contained in the Motion for Review are true and incorporates them herein.

The trial court ultimately ordered that "[t]he legal and physical custody of [Tasha and Tyler] shall be with the Iredell County Department of Social Services" and "[t]he sole legal and physical custody of [Tina] shall be with [P.S.]" The court also ordered that a subsequent permanency planning hearing be held in 90 days. Respondent filed a timely notice of appeal.

Analysis

Respondent argues that the trial court did not possess subject matter jurisdiction to enter its 24 October 2016 order. Alternatively, she contends that even if subject matter jurisdiction existed, the court erred in failing to conduct an adjudicatory hearing pursuant to the provisions of Article 8 of the Juvenile Code. Because we conclude that the trial court did, in fact, lack subject matter jurisdiction, we must vacate the order.

"Subject matter jurisdiction refers to the power of the court to deal with the kind of action in question." *Harris v. Pembaur*, 84 N.C. App. 666, 667, 353 S.E.2d 673, 675 (1987) (citation omitted). It is well established that "[s]ubject matter jurisdiction . . . is conferred upon the courts by either the North Carolina Constitution or by statute." *In re M.B.*, 179 N.C. App. 572, 574, 635 S.E.2d 8, 10 (2006) (citation and quotation marks omitted). With regard to "matters arising under the Juvenile Code, the court's subject matter jurisdiction is established by statute." *In re K.J.L.*, 363 N.C. 343, 345, 677 S.E.2d 835, 837 (2009) (citation omitted). "Subject matter jurisdiction cannot be conferred by consent or waiver, and the issue of subject matter jurisdiction may be raised for the first time on appeal." *In re H.L.A.D.*, 184 N.C. App. 381, 385, 646 S.E.2d 425, 429 (2007), *aff'd per curiam*, 362 N.C. 170, 655 S.E.2d 712 (2008) (citation omitted). Whether a court has jurisdiction is a question of law reviewable *de novo* on appeal. *In re K.U.-S.G., D.L.L.G., & P.T.D.G.*, 208 N.C. App. 128, 131, 702 S.E.2d 103, 105 (2010) (citation omitted).

Our Supreme Court has held that a trial court must have subject matter jurisdiction "over the nature of the case and the type of relief sought, in order to decide a case." *In re T.R.P.*, 360 N.C. 588, 590, 636 S.E.2d 787, 790 (2006) (citation and quotation marks omitted).

> A court cannot undertake to adjudicate a controversy on its own motion; rather, it can adjudicate a controversy only when a party presents the controversy to it, and then, *only if it is presented in the form of a proper pleading*. Thus, before a court may act there must be some appropriate application invoking the judicial power of the court with respect to the matter in question.

In re Transp. of Juveniles, 102 N.C. App. 806, 808, 403 S.E.2d 557, 558 (1991) (citation omitted and emphasis added).

Thus, "a trial court's general jurisdiction over the type of proceeding or over the parties does not confer jurisdiction over the specific action." *In re McKinney*, 158 N.C. App. 441, 447, 581 S.E.2d 793, 797 (2003). "The instant that the court perceives that it is exercising, or is about to exercise, a forbidden or ungranted power, it ought to stay its action, and, if it does not, such action is, in law, a nullity." *In re Officials of Kill Devil Hills Police Dep't*, 223 N.C. App. 113, 117, 733 S.E.2d 582, 586 (2012) (citation and quotation marks omitted) (holding trial court lacked jurisdiction to enter order permitting employees with grievances against police department to present complaint).

We have applied this rule in cases arising under the Juvenile Code. *See*, *e.g.*, *McKinney*, 158 N.C. App. at 446-47, 581 S.E.2d at 796-97 (holding that trial court lacked jurisdiction to enter order terminating parental rights where DSS filed "Motion in the Cause" that did not reference pertinent statutory provisions or seek relief in form of termination of parental rights); *see also Transp. of Juveniles*, 102 N.C. App. at 808, 403 S.E.2d at 559 (ruling that trial court did not possess jurisdiction to enter order transporting delinquent juveniles where no complaint or motion was filed seeking such relief).

In the present case, our jurisdictional analysis is impacted by the General Assembly's recent amendment to N.C. Gen. Stat. § 7B-401 for the purpose of adding subsection (b). *See* 2013 N.C. Sess. Laws 305, 308, ch. 129, § 8 (codified as N.C. Gen. Stat. § 7B-401 (2015)). Section 7B-401(b) states as follows:

> If the court has retained jurisdiction over a juvenile whose custody was granted to a parent and there are no periodic

> judicial reviews of the placement, the provisions of Article 8 of this subchapter shall apply to any subsequent report of abuse, neglect, or dependency determined by the director of social services to require court action pursuant to G.S. 7B-302.[3]

N.C. Gen. Stat. § 7B-401(b) (footnote added).

In order for § 7B-401(b) to apply, four requirements must be met: (1) the court must have "retained jurisdiction over a juvenile whose custody was granted to a parent"; (2) the court must no longer be holding "periodic judicial reviews of the placement" of the juvenile; (3) after the court discontinued periodic judicial reviews, DSS must have received a new report of abuse, neglect, or dependency; and (4) the director of social services must have determined based on an assessment conducted pursuant to § 7B-302 that court action was required.

In cases where § 7B-401(b) is applicable, the director (or his designee) must file a petition in the existing case setting out the new allegations of abuse, neglect, or dependency in order for the trial court to have subject matter jurisdiction to adjudicate the juvenile. Once the petition is filed, the trial court is required to follow the provisions of Article 8 and conduct an adjudicatory hearing. If the court determines that the allegations in the petition were proved by clear and convincing evidence and adjudicates the juvenile as abused, neglected, or dependent, it must then conduct an initial dispositional hearing. *See* N.C. Gen. Stat. § 7B-807(a) (2015); N.C. Gen. Stat. § 7B-808(a) (2015); *see also* N.C. Gen. Stat. § 7B-901(a) (2015) ("The dispositional hearing shall take place immediately following the adjudicatory hearing and shall be concluded within 30 days of the conclusion of the adjudicatory hearing.").

The criteria set out in § 7B-401(b) were met in this case. In its 7 September 2016 order, the trial court stated that "[w]hile the Court retains jurisdiction, no further regular review hearings are scheduled." On 14 September 2016, DSS received a new Child Protective Services report from law enforcement officers. Two days later, DSS filed three motions for review based on this report as well as the social worker's

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3. N.C. Gen. Stat. § 7B-302 provides the procedure by which the director of DSS must conduct an assessment "in order to ascertain the facts of the case, the extent of the abuse or neglect, and the risk of harm to the juvenile, in order to determine whether protective services should be provided or the complaint filed as a petition." N.C. Gen. Stat. § 7B-302(a) (2015). This statute also provides that if abuse, neglect, or dependency has occurred, the director must determine whether immediate removal is required or otherwise arrange protective services for the care of the juvenile. N.C. Gen. Stat. § 7B-302(c)-(d).

subsequent meeting with Respondent. Thus, because § 7B-401(b) was triggered, DSS was required to file a verified petition seeking an adjudication of the juveniles. The trial court was then required to conduct an adjudicatory hearing pursuant to the provisions of Article 8 to determine if an adjudication of abuse, neglect, or dependency was appropriate and — if so — to then conduct a dispositional hearing.

However, rather than filing a petition seeking such an adjudication, DSS instead merely submitted motions for review requesting that the trial court "hear and further consider the case of the juvenile . . . [due to a c]hange in situation." Therefore, based on N.C. Gen. Stat. § 7B-401(b), despite the fact that the trial court's 7 September 2016 order stated that the court was "retain[ing] jurisdiction," the court lacked subject matter jurisdiction to adjudicate the new allegations of abuse, neglect, or dependency absent a verified petition filed by DSS, which would — in turn — have implicated the provisions of Article 8.

Accordingly, even if DSS *had* properly filed a petition as required by § 7B-401(b), the trial court would have been required to then conduct a new *adjudicatory* hearing pursuant to Article 8, which it did not do in this case. Instead, the trial court simply conducted a *dispositional* hearing, determining that a change in circumstances had occurred that affected the best interests of the children and that — for this reason — removal of the children from Respondent's custody was necessary. *See T.R.P.*, 360 N.C. at 593, 636 S.E.2d at 792 ("[A] dispositional hearing . . . must be preceded by the filing of a petition and an adjudication.").

Thus, the trial court's error was twofold: (1) it took action based on the new allegations of abuse, neglect, or dependency without DSS having filed a verified petition that would have conferred subject matter jurisdiction upon it to do so; and (2) it conducted a dispositional hearing and subsequently entered a dispositional order removing custody of the juveniles from Respondent without first conducting a new adjudicatory hearing and actually adjudicating the children to be abused, neglected, or dependent.

Our ruling on this issue is supported by the language used by the General Assembly both in § 7B-401(b) and Article 8 of the Juvenile Code. As noted above, § 7B-401(b) expressly incorporates Article 8. *See* N.C. Gen. Stat. § 7B-401(b) (" . . . [T]he provisions of Article 8 of this subchapter shall apply to any subsequent report of abuse, neglect, or dependency . . . ."). Article 8 of the Juvenile Code guarantees a parent the right to a hearing before her child is adjudicated abused, neglected, or dependent. *See* N.C. Gen. Stat. § 7B-802 (2015).

Article 8 also makes the filing of a verified petition a mandatory prerequisite to such a hearing, stating, in pertinent part, that an adjudicatory hearing "shall be a judicial process designed to adjudicate the existence or nonexistence of any of the conditions alleged *in a petition*" and that "[t]he allegations *in a petition* alleging that a juvenile is abused, neglected, or dependent shall be proved by clear and convincing evidence." *Id.* (emphasis added); N.C. Gen. Stat. § 7B-805 (2015) (emphasis added). Article 8 further provides that "[i]f the court finds from the evidence, including stipulations by a party, that the allegations *in the petition* have been proven by clear and convincing evidence, the court shall so state." N.C. Gen. Stat. § 7B-807(a) (emphasis added); *see also T.R.P.*, 360 N.C. at 598, 636 S.E.2d at 795 (holding "the trial court has no power to act" where verified petition invoking subject matter jurisdiction was not filed prior to order removing custody).

It is important to note that a petition is not a mere technical requirement. To the contrary, a petition in the form required by N.C. Gen. Stat. § 7B-402 ensures that the due process rights of a parent are protected by requiring a petitioner to make specific allegations of abuse, neglect or dependency and set out the relief it is seeking from the court in connection with the juvenile at issue. *See T.R.P.*, 360 N.C. at 592, 636 S.E.2d at 791 ("[G]iven the magnitude of the interests at stake in juvenile cases and the potentially devastating consequences of any errors, the General Assembly's requirement of a verified petition is a reasonable method of assuring that our courts exercise their power only when an identifiable government actor 'vouches' for the validity of the allegations in such a freighted action."). Thus, the petition allows a parent to fully understand the allegations being made and the relief being sought so as to provide her with a full and fair opportunity to rebut those allegations.

We note that our ruling in the present case is consistent with our decision in *McKinney*. In that case, the Orange County DSS filed a document captioned "Motion in the Cause" in an ongoing neglect and dependency action pursuant to N.C. Gen. Stat. § 7B-1102. *McKinney*, 158 N.C. App. at 443, 581 S.E.2d at 794. Although the motion contained various factual allegations, it failed to (1) state that it was a petition for termination of parental rights; (2) reference the statutory provisions governing termination of parental rights; or (3) request any specific relief from the court. *Id.* at 446, 581 S.E.2d at 796-97. After a hearing was held on DSS's motion, the trial court entered an order terminating the respondent-mother's parental rights to the juvenile. *Id.* at 443, 581 S.E.2d at 794.

On appeal, the respondent-mother asserted errors "not associated with subject matter jurisdiction[,]" but we nevertheless determined *ex mero motu* that the trial court lacked jurisdiction to enter its order. *Id.*

at 443, 581 S.E.2d at 794-95. In our decision, we stated that "[t]o be valid, a pleading or motion must include a request or demand for the relief sought, or for the order the party desires the trial court to enter[.]" *Id.* at 444, 581 S.E.2d at 795. We ruled that "an examination of petitioner's motion reveal[ed] that it nowhere ask[ed] for the termination of respondent's parental rights" and did not "reference any of the statutory provisions governing termination of parental rights." *Id.* at 445-46, 581 S.E.2d at 796-97. Indeed, we noted that the motion "fail[ed] to request *any* relief, judgment, or order from the trial court." *Id.* at 446, 581 S.E.2d at 797. Notably, in holding that the trial court lacked subject matter jurisdiction to enter the order, we stated that "a trial court's general jurisdiction over the type of proceeding or over the parties *does not confer jurisdiction over the specific action*." *Id.* at 447, 581 S.E.2d at 797 (citation omitted and emphasis added).

We wish to emphasize that our decision today applies only to proceedings that fall within the purview of § 7B-401(b). Nothing in our ruling should be construed as holding that the trial court is divested of general jurisdiction in an abuse, neglect, or dependency action simply because it discontinues periodic judicial reviews. *See* N.C. Gen. Stat. § 7B-201 ("When the court obtains jurisdiction over a juvenile, jurisdiction shall continue until terminated by order of the court or until the juvenile reaches the age of 18 years or is otherwise emancipated, whichever occurs first."). Rather, we are simply holding that in cases where — as here — a director of social services seeks court action based on a new report of abuse, neglect, or dependency in a case that falls within the parameters of N.C. Gen. Stat. § 7B-401(b), the trial court lacks subject matter jurisdiction to adjudicate the juvenile as abused, neglected, or dependent absent the prior filing of a verified petition by DSS as required by Article 8. Moreover, a trial court in such circumstances cannot proceed directly to a dispositional hearing without first conducting an adjudicatory hearing and actually adjudicating the juvenile as abused, neglected, or dependent.

Accordingly, the trial court's 24 October 2016 order is vacated. *See McKinney*, 158 N.C. App. at 448, 581 S.E.2d at 798 (vacating trial court's order for lack of subject matter jurisdiction).

Conclusion

For the reasons stated above, we vacate the trial court's 24 October 2016 order.

VACATED.

Judges HUNTER, JR. and MURPHY concur.

JOHNSON v. WAYNE MEM'L HOSP., INC.

[254 N.C. App. 295 (2017)]

TRACIE JOHNSON, ADMINISTRATOR OF THE ESTATE OF MARIO JOHNSON, DECEASED, PLAINTIFF
v.
WAYNE MEMORIAL HOSPITAL, INC., TERRY A. GRANT, M.D., IMMEDIATE CARE OF GOLDSBORO, PLLC, GOLDSBORO EMERGENCY MEDICAL SPECIALISTS, INC., DENNIS A. ISENHOWER, P.A., LLOYD SMITH, M.D., PHILIP D. MAYO, M.D., AND EASTERN MEDICAL ASSOCIATES, P.A., DEFENDANTS

No. COA17-106

Filed 5 July 2017

Medical Malpractice—medical negligence—directed verdict—emergency room—X-ray reading—discrepancies

The trial court did not err in a medical negligence case by granting directed verdict in favor of defendant hospital arising from its policy for review discrepancies between the reading of X-rays by an emergency room physician and a radiologist. Plaintiff estate administrator failed to offer competent testimony as to the standard of care or the hospital's breach of that standard.

Appeal by plaintiff from order entered 19 February 2016 by Judge Beecher R. Gray in Wayne County Superior Court. Heard in the Court of Appeals 8 June 2017.

The Melvin Law Firm, P.A., by R. Bailey Melvin, for plaintiff-appellant.

McGuireWoods LLP, by Patrick M. Meacham and Kayla Marshall, for defendant-appellee Wayne Memorial Hospital, Inc.

ZACHARY, Judge.

Tracie Johnson, Administrator of the Estate of Mario Johnson (plaintiff), appeals from an order granting directed verdict in favor of Wayne Memorial Hospital, Inc. (defendant, hereafter "the hospital") on plaintiff's claim of medical negligence. Plaintiff alleged that the hospital's process for review of X-ray over-read discrepancies did not meet the standard of care for hospitals in the same or similar communities. On appeal, plaintiff contends that the court erred by ruling that plaintiff failed to present competent evidence of the relevant standard of care and by ruling that the hospital was insulated from liability arising from its allegedly negligent policy for review of X-ray over-read discrepancies by the subsequent intervening negligence of the physicians who treated

Mario Johnson (Mr. Johnson) prior to his death. After careful review of plaintiff's arguments in light of the record on appeal and the applicable law, we conclude that the trial court did not err by granting directed verdict for the hospital based on plaintiff's failure to offer competent testimony as to the standard of care or the hospital's breach of that standard. Having affirmed the court's order on this basis, we find it unnecessary to reach plaintiff's other argument.

I. Factual and Procedural History

At around 3:00 a.m. on 11 February 2011, Mr. Johnson came to the emergency department of the hospital seeking treatment for pain. Mr. Johnson suffered from sickle cell anemia, an inherited blood disorder that affects red blood cells. At the emergency room, Mr. Johnson was treated by Dr. Terry Grant, M.D., who administered pain medication and a saline solution, and ordered various tests for Mr. Johnson, including blood tests, an EKG, a test for influenza, and a chest X-ray. The results of these tests showed that Mr. Johnson's temperature, respiration, blood pressure, and blood oxygen level were normal. The blood test results indicated that Mr. Johnson's white blood cell count was elevated, which can be caused by a variety of medical conditions; however, other blood tests indicated that Mr. Johnson's red blood cells were normal and that he was not showing signs of inflammation. Dr. Grant's interpretation of the X-ray of Mr. Johnson's chest was that the results were normal. Dr. Grant concluded that because Mr. Johnson "did not appear overtly ill" and that because his "vital signs were normal" he did not need to be admitted to the hospital. Mr. Johnson was discharged from the hospital at around 5:00 a.m., with instructions to return if his condition worsened. Mr. Johnson returned to the hospital on 12 February 2011, at which time health care providers in the emergency room determined that he was suffering from "acute chest syndrome," a life-threatening complication of sickle cell anemia. Mr. Johnson was admitted to the intensive care department of the hospital. Despite further treatment, Mr. Johnson died during the early morning hours of 13 February 2011.

On 11 February 2013, plaintiff filed suit against Wayne Memorial Hospital, Inc.; Dr. Terry Grant; Dr. Paul Willman; Dennis Isenhower, P.A.; Dr. Lloyd Smith; Dr. Philip Mayo; Immediate Care of Goldsboro, PLLC; Goldsboro Emergency Medical Specialists, Inc.; Wayne Radiologists, P.A.; and Eastern Medical Associates, P.A. Dr. Smith, Dr. Mayo, Dr. Willman, and Physician's Assistant Isenhower[1] were health care providers who

1. The term "PA" refers to a physician's assistant. A PA, although not licensed to practice medicine, has extensive training in providing health care to patients.

treated Mr. Johnson on 12 and 13 February 2011. Plaintiff's complaint alleged that (1) all of the individual defendants were agents or employees of the hospital; (2) Dr. Grant was an agent, employee, or owner of Immediate Care of Goldsboro, PLLC, and of Goldsboro Emergency Medical Specialists, Inc.; (3) Dr. Willman was an agent, employee, or owner of Wayne Radiologists, P.A.; (4) PA Isenhower and Dr. Smith were agents or employees of Immediate Care of Goldsboro, PLLC, and of Goldsboro Emergency Medical Specialists, Inc.; and (5) Dr. Mayo was an agent, employee, or owner of Eastern Medical Associates, P.A. Plaintiff sought damages for medical malpractice, based upon the alleged negligence of the individual defendants as well as the derivative liability of the hospital and the medical practices with which plaintiff alleged that the individual defendants were associated. With respect to the individual defendants, plaintiff alleged that each had failed to provide appropriate care to Mr. Johnson or to meet the relevant standard of care and that the individual's negligence was a proximate cause of Mr. Johnson's death. Plaintiff sought damages against the hospital based upon allegations of medical malpractice arising from negligent treatment of Mr. Johnson, together with allegations that the hospital was negligent in that its policy for review of discrepancies between an emergency room physician's interpretation of an X-ray and that of a radiologist did not meet the relevant standard of care. The plaintiff later dismissed all claims against defendants Immediate Care of Goldsboro, PLLC, Dr. Willman, and Wayne Radiologists, P.A.

Plaintiff's claims against the remaining defendants were tried before the trial court and a jury beginning on 25 January 2016. The evidence offered at trial is discussed below, as relevant to the issues raised on appeal. At the close of plaintiff's evidence, the trial court granted directed verdict in favor of the hospital on plaintiff's allegations that the individual defendants were actual or apparent agents of the hospital, and on plaintiff's claims of clinical malpractice of the hospital arising from the individual health care providers' treatment of Mr. Johnson. The trial court did not dismiss plaintiff's negligence claim against the hospital based on the hospital's process for review of X-ray over-read discrepancies. At the close of all the evidence, however, the trial court granted directed verdict in favor of the hospital on this claim as well. As a result, the only claims submitted to the jury were the allegations of negligence on the part of the individual defendants.

The jury returned verdicts finding that the individual defendants were not negligent. The trial court signed an order on 8 February 2016, which was filed on 8 March 2016, dismissing all of plaintiff's claims with prejudice. On 18 February 2016, plaintiff filed a motion asking the trial

court to reconsider its entry of directed verdict in favor of the hospital on plaintiff's claim that the hospital's process for review of X-ray over-read discrepancies did not meet the standard of care. The trial court denied plaintiff's motion on 8 March 2016. On the same day, plaintiff noted an appeal to this Court "from the [trial court's] Order for a Directed Verdict for [the hospital], entered on February 10, 2016[.]" The directed verdict to which plaintiff's notice of appeal refers is the order directing a verdict in favor of the hospital on plaintiff's claim arising from the hospital's policy for review of X-ray over-read discrepancies. Plaintiff has not appealed from the trial court's order granting directed verdict for the hospital on plaintiff's claim for liability based on agency, from the verdicts finding the individual defendants not negligent, or from the judgment entered by the trial court after the trial. Therefore, the only issue before us on appeal is plaintiff's challenge to the order that effectively dismissed the claim that the hospital was negligent in its X-ray over-read discrepancy review policy.

II. Standard of Review

Plaintiff has appealed from an order granting directed verdict for the hospital. "The standard of review of directed verdict is whether the evidence, taken in the light most favorable to the non-moving party, is sufficient as a matter of law to be submitted to the jury." *Green v. Freeman*, 367 N.C. 136, 140, 749 S.E.2d 262, 267 (2013) (internal quotation omitted).

> When considering a motion for a directed verdict, a trial court must view the evidence in the light most favorable to the non-moving party, giving that party the benefit of every reasonable inference arising from the evidence. Any conflicts and inconsistencies in the evidence must be resolved in favor of the non-moving party. If there is more than a scintilla of evidence supporting each element of the non-moving party's claim, the motion for a directed verdict should be denied. . . . Because the trial court's ruling on a motion for a directed verdict addressing the sufficiency of the evidence presents a question of law, it is reviewed *de novo*.

Maxwell v. Michael P. Doyle, Inc., 164 N.C. App. 319, 322-23, 595 S.E.2d 759, 761 (2004) (citations omitted). "A motion for directed verdict 'tests the legal sufficiency of the evidence to take the case to the jury and support a verdict' for the nonmovant." *Scarborough v. Dillard's, Inc.*, 363 N.C. 715, 720, 693 S.E.2d 640, 643 (2009) (quoting *Manganello v. Permastone, Inc.*, 291 N.C. 666, 670, 231 S.E.2d 678, 680 (1977)).

On appeal, plaintiff challenges certain findings of fact made by the trial court in its directed verdict order. "However, this Court, in reviewing trial court rulings on motions for directed verdict and judgment notwithstanding the verdict, has held that the trial court should not make findings of fact, and if the trial court finds facts, they are not binding on the appellate court. . . . [T]hese findings are not binding on the appellate court even if unchallenged by the appellant." *Scarborough*, 363 N.C. at 722-23, 693 S.E.2d at 644 (citation omitted). As a result, our review of the propriety of the trial court's directed verdict order is not dependent upon the evidentiary support for or the legal relevance of the court's findings of fact.

III. Medical Malpractice Claim Against the Hospital

A. Legal Principles

In reviewing a trial court's ruling on a motion for directed verdict, "our *de novo* inquiry is whether the evidence, taken in a light most favorable to plaintiff, provides more than a scintilla of evidence to support each element of plaintiff's claim. If that burden is satisfied, the motion for directed verdict should be denied[.]" *Heller v. Somdahl*, 206 N.C. App. 313, 314, 696 S.E.2d 857, 860 (2010) (citation omitted).

"Evidence of medical negligence or malpractice adequate to withstand a motion for directed verdict must establish each of the following elements: '(1) the standard of care [duty owed]; (2) breach of the standard of care; (3) proximate causation; and (4) damages.' Failure to make a *prima facie* evidentiary showing in support of even one element is fatal." *Clark v. Perry*, 114 N.C. App. 297, 304-05, 442 S.E.2d 57, 61 (1994) (quoting *Lowery v. Newton*, 52 N.C. App. 234, 237, 278 S.E.2d 566, 570 (1981) (other citation omitted).

"One of the essential elements of a claim for medical negligence is that the defendant breached the applicable standard of medical care owed to the plaintiff." *Goins v. Puleo*, 350 N.C. 277, 281, 512 S.E.2d 748, 751 (1999). "Plaintiffs must establish the relevant standard of care through expert testimony." *Crocker v. Roethling*, 363 N.C. 140, 142, 675 S.E.2d 625, 628 (2009) (citations omitted). "To meet their burden of proving the applicable standard of care, plaintiffs must satisfy the requirements of N.C.G.S. § 90-21.12[.]" *Id.* At the time that plaintiff's claim arose,[2] N.C. Gen. Stat. § 90-21.12(a) provided that:

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2. N.C. Gen. Stat. § 90-21.2 was amended effective 1 October 2011, and "apply[ing] to causes of action arising on or after that date." Because plaintiff's claim arose in February, 2011, it is governed by the earlier version of N.C. Gen. Stat. § 90-21.2.

> In any action for damages for personal injury or death arising out of the furnishing or the failure to furnish professional services in the performance of medical . . . care, the defendant shall not be liable for the payment of damages unless the trier of the facts is satisfied by the greater weight of the evidence that the care of such health care provider was not in accordance with the standards of practice among members of the same health care profession with similar training and experience situated in the same or similar communities at the time of the alleged act giving rise to the cause of action.

B. Discussion

Plaintiff alleges that the hospital was negligent in its process for review by a radiologist of X-rays that were originally interpreted by an emergency room physician and subsequent communication of any discrepancy in the radiologist's interpretation to emergency room personnel. The dispositive issue is whether plaintiff produced evidence that the hospital's policy or practice "was not in accordance with the standards of practice among members of the same health care profession with similar training and experience situated in the same or similar communities at the time of the alleged act giving rise to the cause of action[.]" N.C. Gen. Stat. § 90-21.12(a) (2011). We conclude that plaintiff failed to offer any evidence of either (1) the standard of care to which a hospital in the same or similar community should adhere in its process for the review of X-rays, or (2) the hospital's breach of the standard of care.

The hospital policy at issue becomes relevant in the following circumstances. When a patient, such as Mr. Johnson, is treated in the hospital's emergency room, the physician who is treating the patient may order an X-ray. The emergency room physician reviews, or "reads," the X-ray as part of the physician's determination of the appropriate treatment for the patient. The X-ray is later provided to a radiologist, who is a physician specializing in the interpretation and analysis of X-rays and other scans. The radiologist's review of the X-ray that was originally interpreted by the emergency room physician is referred to as an "over-read." If the radiologist's interpretation of the X-ray differs from that of the emergency room physician, this difference is termed a "discrepancy." Plaintiff alleges that the hospital's process for informing emergency room personnel about a discrepancy observed by the radiologist in the over-read did not meet the applicable standard of care.

The general structure of the hospital's policy at the time of Mr. Johnson's treatment at the hospital in regard to communication about

discrepancies detected in a radiologist's over-read is set out in the hospital's Policy Number ED-019, which states, in relevant part, that:

> Purpose: To provide a system for follow up of diagnostic tests. . . . To provide guidelines for contacting patients when additional or alternative treatment is necessary following an Emergency Department visit.
>
> . . .
>
> Policy:
>
> A. Follow up of diagnostic tests will be done in the Emergency Department under the direction of a physician.
>
> B. The Emergency Department Supervisor will review all . . . radiologist interpretations[.] . . . Discrepancies will be reported to the Emergency Department physician/PA.
>
> . . .
>
> E. The Emergency Department physician/PA will review the corresponding patient's record to decide whether the variance is clinically significant and requires contacting the patient, or whether a variance exists, but [is] not clinically relevant to the Emergency Department visit and requires no further treatment.
>
> Radiology:
>
> 1. X-rays ordered by an Emergency Department physician or PA are initially interpreted by the Emergency Department physician with final interpretation by a radiologist.
>
> . . .
>
> 4. The ED supervisor compares the Emergency Department physician's preliminary findings . . . with the final radiologist interpretation. If a discrepancy exists, the "Emergency Department Radiology Follow-up Form" will be completed.

Plaintiff's negligence claim against the hospital is not based upon a challenge to the general parameters of the hospital's policy for review of discrepancies. Nor does plaintiff allege that the hospital failed to implement its policy in this case. Plaintiff instead contends that that the hospital's negligence "is not based upon the policy itself but on the timeframe

established by the hospital to carry out the policy." Thus, plaintiff does not allege that the hospital was negligent for utilizing a sequence of successive reviews by the emergency room physician, the radiologist, a nurse, and then emergency room personnel. Plaintiff's claim is narrowly focused upon the fact that, unless the radiologist determined that the emergency room should be contacted immediately, it typically took about 24 hours after an emergency room physician's initial read of an X-ray before the emergency room staff would be informed of the radiologist's differing interpretation.

The schedule or timeline of the hospital's process for review of X-ray over-read discrepancies was established through the testimony of Nurse Laura Bruce, the Clinical Director of the hospital's emergency department, and Dr. Paul Willman, the radiologist who reviewed Mr. Johnson's X-ray. Dr. Willman testified that the radiologist would contact the emergency department directly if, in the opinion of the radiologist, the X-ray revealed a life-threatening situation or a medical condition for which a patient required immediate attention. Nurse Bruce described the hospital's process for the further review of X-rays that had been read by an emergency room physician and subsequently reviewed by a radiologist in situations in which the radiologist did not find it necessary to contact the emergency room immediately. Each morning the nurse supervisor reviewed the X-rays that were taken between midnight the day before until midnight of that day. If there was a discrepancy between the X-ray interpretation of the emergency department physician and that of the radiologist, the nurse supervisor would complete a form detailing the situation. The form would then be reviewed by an emergency room PA or physician, who would determine what, if anything, should be done in response to the discrepancy. Thus, if the radiologist did not perceive the need for immediate intervention, it would typically be at least 24 hours between the emergency room physician's initial reading of an X-ray and the opportunity for a physician to compare that review with the results of the radiologist's reading of the X-ray.

In this case, X-rays were taken between 3:00 and 5:00 a.m. on 11 February 2011, and Mr. Johnson was discharged from the emergency room at around 5:30 a.m. At approximately 8:00 a.m. that morning, Mr. Johnson's X-ray was reviewed by Dr. Paul Willman, a radiologist who practiced at the hospital and testified at trial as an expert in radiology. In February 2011, Dr. Willman's duties included a review each morning of the X-rays taken during the previous night. On 11 February 2011, Dr. Willman reviewed the X-ray of Mr. Johnson's chest and lungs and observed a "very subtle" abnormality, which he characterized as a "left

lobe infiltrate." Because Dr. Willman did not consider this finding to be "dangerous, ominous, or concerning," he did not report it directly to the emergency department. The discrepancy was provided to the nurse supervisor about 14 hours later, just after midnight on 12 February 2011. She shared the results with the emergency room PA when he arrived for work on the morning of 12 February 2011. However, Mr. Johnson had already returned to the emergency room during the morning of 12 February 2011, "before it got to [the] stage of the process" in which a PA would conduct further review.

Plaintiff contends that the hospital's process for communication of discrepancies in review of X-rays failed to meet the proper standard of care in regard to the "timeframe" within which such discrepancies should be brought to the attention of an emergency room physician. Specifically, plaintiff alleges that the hospital breached the standard of care because, unless the radiologist found a discrepancy that appeared to require urgent treatment, it could be 24 hours between the time that an emergency room physician reviewed an X-ray and the time that emergency room personnel received a copy of the radiologist's description of the over-read showing a discrepancy.

In order to meet the standard for recovery enunciated in N.C. Gen. Stat. § 90-21.12, plaintiff was required to establish that the hospital's policy did not meet "the standards of practice among [other hospitals] . . . situated in the same or similar communities at the time of the alleged act giving rise to the cause of action." Accordingly, to establish the standard of care, plaintiff was required to produce evidence showing whether the hospital met the standard of care for similar hospitals in regard to the timely communication of information about over-read discrepancies between the radiologist and the emergency room personnel. This Court held in *Tripp v. Pate*, 49 N.C. App. 329, 333, 271 S.E.2d 407, 409-10 (1980), a case bearing some factual similarity to the present case, that the failure to produce such evidence supported entry of directed verdict in favor of the hospital:

> First, plaintiff argues she presented evidence the hospital was negligent in not reporting promptly the results of certain tests ordered by plaintiff's doctors after her surgery, thereby causing a delay in the diagnosis of plaintiff's condition. In order to withstand a motion for directed verdict on this issue, however, plaintiff was required by N.C. Gen. Stat. § 90-21.12, *supra*, to offer some evidence that the care of the defendant hospital was not in accordance with the standards of practice among other hospitals in

> the same or similar communities. Plaintiff failed to present any evidence of the standard of care for a hospital in Kinston or similar communities regarding time necessary to report test results. (Emphasis added).

In the instant case, plaintiff offered the testimony of Dr. Brian Quigley to establish the standard of care for a hospital's policy for communication of discrepancies found in a radiologist's over-read, and the hospital's breach of that standard. On appeal, the parties have offered arguments as to whether Dr. Quigley was qualified to offer expert testimony on the standard of care for timely communication between the radiologist and the emergency room staff of an X-ray over-read discrepancy. Upon review of the transcript, however, we conclude that Dr. Quigley did not offer testimony establishing either the standard of care or the hospital's breach of the standard. As a result, we find it unnecessary to address the parties' arguments concerning whether he would have been qualified to give such testimony.

Dr. Quigley, who testified as an expert in emergency medicine, testified that he had reviewed information about Goldsboro and about Wayne Memorial Hospital and specifically its emergency room, and was "familiar with the type of policies and procedures that hospitals like Wayne Memorial should have in their emergency room." When asked by plaintiff's counsel, Dr. Quigley agreed that a hospital should "have a system set up to make sure there's good communication between radiology and emergency medicine when there's this kind of discrepancy between the [physicians' interpretation of X-rays]." Dr. Quigley testified as follows when asked by plaintiff's counsel to "explain the system, the policy that Wayne Memorial had set up regarding these over, over -- X-Ray overreads and the discrepancies."

> [DR. QUIGLEY]: Well, a discrepancy policy means that there is a discrepancy between . . . an emergency physician's reading versus what the radiologist's is, and from what I understand, the policy was that they collected the X-rays from one midnight to the next midnight, and then they matched up what the radiologist's reading was with what the emergency physician's reading was, and if there was a discrepancy between the two, then they brought those up to the emergency department, they're pulled by the nurse supervisor, and brought up to the emergency department, and then the physician assistant would review these discrepancies, look at the chart, look at the overread of the radiologist, and then make a determination

> whether clinically they were of concern, whether or not to call the patient back or have them come back to the emergency department.

Dr. Quigley's testimony reflects a general understanding of the hospital's policy, with one significant omission: Dr. Quigley did not acknowledge that, in the event that the radiologist determined that a discrepancy indicated a medical condition requiring urgent attention, he would contact the emergency room staff directly.

On direct examination, Dr. Quigley indicated that he was generally "familiar with the standard of care in February of 2011 in Goldsboro, North Carolina or similar communities as it applies to the type of care and treatment that Mario Johnson received." However, when he was questioned specifically about the X-ray over-read discrepancy policies or practices of hospitals in the same or similar communities in 2011, Dr. Quigley conceded that he had no information on the subject:

> Q. Do you agree that Wayne Memorial Hospital followed their discrepancy policy as it was written?
>
> A. As it was written, yes.
>
> . . .
>
> Q. Yesterday I believe, when you were answering Mr. Melvin's questions, you said something to the effect that the Wayne Memorial discrepancy policy was an archaic system as it existed in February of 2011. Do you recall that?
>
> A. Yes, sir.
>
> Q. Now, did you make any effort to call around to any hospitals other than Rex to find out what type of systems they were using for discrepancies?
>
> A. No, I didn't make any specific phone calls.
>
> Q. Okay. So you don't know if this Rex policy is similar to the type of policies that are being used in other hospitals throughout Eastern North Carolina?
>
> A. Well, I think every hospital operates a little differently. I can only speak for the fact that we have 24 hour coverage currently, and in 2011.
>
> . . .

> Q. Okay? You cannot say, as you sit here today, whether the policy that Wayne Memorial Hospital had in February of 2011 is similar to that of other hospitals similarly situated in Eastern North Carolina at that same time.
>
> A. No, I would have had to go back in time in 2011 and call each specific Emergency Department and find out what their policies were.
>
> Q. Well, you could have done that in advance of your deposition two years ago. Correct?
>
> A. Yes.
>
> Q. You did not.
>
> A. No, I didn't make any calls.
>
> Q. And you haven't made any such calls or made any inquiry since May 13, 2014. Correct?
>
> A. That's correct.

Dr. Quigley did not offer any testimony at trial that could establish the standard of care applicable to the policies or practices of hospitals in similar communities in 2011 concerning the time frame for communication of an over-read discrepancy between a radiologist and the emergency room staff. The absence of any testimony on the standard of care is consistent with Dr. Quigley's admission that he had not made any inquiries to determine the practices of other hospitals in 2011. We conclude that Dr. Quigley failed to offer evidence on the relevant standard of care and that, because Dr. Quigley was plaintiff's only witness on this issue, the trial court did not err by granting directed verdict in favor of the hospital.

In urging us to reach a different conclusion, plaintiff asserts that:

> Dr. Quigley testified that he was familiar with the standard of care in Goldsboro, N.C. and similar communities and that Wayne Memorial had violated the standard of care by having a system that allowed for a 28-hour delay in informing the emergency department that the X-ray had been misread. Dr. Quigley testified that in order to comply with the standard of care Wayne Memorial needed a system where the radiologist's interrogation [sic] of the X-ray needed to be brought to the attention of the emergency department within 4-5 hours.

Plaintiff's appellate brief cites pages 15, 55, and 61 of the trial transcript as the sources for these contentions. Plaintiff accurately cites page 15 for the statement that Dr. Quigley testified to his familiarity with the standard of care in Goldsboro and similar communities. However, the testimony presented on the other pages cited by plaintiff does not support plaintiff's position. Following is the testimony to which plaintiff refers:

> Q. Now this system that Wayne Memorial has about getting this information from Radiology to the Emergency Room, in your opinion, is that system within the standard of care for a hospital emergency room?
>
> A. No, especially not in 2011.
>
> Q. Why not?
>
> A. Well, if you look at the record it was actually read by the radiologist . . . [Mr. Johnson] was discharged early morning on the 11th, and was discharged home at that time at about 5 a.m. The radiologist over-read the film and had a report in the system electronically at 7:58 a.m. . . . [B]ut then there's a delay with this process with the midnight to midnight, then no one sees the discrepancy on the over-read for 24, 28 hours. And this makes a difference clinically.
>
> . . .
>
> Q. . . . Now, to have a system or a policy that meets the standard of care, in your opinion, how long can the delay be? We've got about a 28 to 30 hour in Mario's case. If they're going to have a system that meets the standard of care, how long should the delay be?
>
> A. I would say that, in 2011, with the electronic dictations into the chart, maybe 4 or 5 hours.
>
> Q. All right. And that would -- I'm sorry.
>
> A. Roughly. Roughly.
>
> Q. Okay.
>
> A. That's a guess.
>
> Q. And that would mean, in Mario's case, that should have come to somebody's attention by what time?

> A. Well, if you -- if you go by this system, if they read at 7:58 and someone's ongoingly pulling up these discrepancies, it should have occurred earlier on February 11.
>
> Q. All right.
>
> A. Sometime maybe early morning, late morning, early afternoon.

We conclude for several reasons that Dr. Quigley's testimony did not constitute competent evidence of the relevant standard of care or of the hospital's breach of that standard. First, Dr. Quigley offered no testimony or other evidence as to the policies in effect at other hospitals in similar communities in 2011. In fact, as discussed above, Dr. Quigley admitted that he had never tried to obtain information on the subject. Dr. Quigley was asked how long the delay "should be," and not how long the delay actually was in comparable hospitals. As a result, the jury would have had no way to compare the time frame of this hospital's policy to that of other hospitals. Secondly, when asked how long the delay should be, Dr. Quigley candidly admitted that he could only guess. He estimated that the emergency room should be made aware of the radiologist's over-read within "roughly, roughly" "maybe 4-5 hours," which he conceded was "a guess." Taking into consideration Dr. Quigley's admitted lack of information about the pertinent standard of care, the absence of testimony establishing the standard, and Dr. Quigley's characterization of an appropriate time frame as a rough guess, we conclude that Dr. Quigley did not offer competent evidence on the standard of care or the hospital's breach of that standard.

IV. Conclusion

Having reached this conclusion, we find it unnecessary to reach the parties' other arguments. We conclude that the trial court did not err by granting directed verdict in favor of the hospital and that its order should be

AFFIRMED.

Judges DILLON concurs.

Judge BERGER, JR. concurs in result only.

O'NEAL v. O'NEAL

[254 N.C. App. 309 (2017)]

BARBARA G. O'NEAL, BY AND THROUGH G. ELVIN SMALL, III, GUARDIAN OF THE ESTATE OF BARBARA G. O'NEAL, PLAINTIFF

v.

PAMELA SUE O'NEAL; PAMELA SUE O'NEAL, AS TRUSTEE OF BARBARA O'NEAL LAND TRUST; PAMELA SUE O'NEAL, AS TRUSTEE OF BARBARA O'NEAL FARM LAND TRUST; PAMELA SUE O'NEAL, AS TRUSTEE OF BARBARA O'NEAL BARCO LAND TRUST; BARBARA O'NEAL LAND TRUST; BARBARA O'NEAL FARM LAND TRUST; BARBARA O'NEAL BARCO LAND TRUST; AND LORI ANN CHAPPELLE, DEFENDANTS

No. COA16-1299

Filed 5 July 2017

1. Powers of Attorney—attorney-in-fact—incompetency—void power of attorney—void deeds

The trial court did not err in an action to have a power of attorney and three deeds declared void by granting judgment on the pleadings in favor of plaintiff grandmother where plaintiff's adjudication of incompetency rendered her incapable of executing a legally operative power of attorney in favor of her granddaughter. The deeds that the granddaughter executed as her grandmother's attorney-in-fact (in favor of herself two days before the granddaughter's four-year general guardianship of the grandmother revocation was recorded) were also void.

2. Powers of Attorney—incompetency—subsequent good faith purchasers of real property—constructive notice

The trial court did not err in an action to have a power of attorney and three deeds declared void by granting judgment on the pleadings in favor of plaintiff grandmother where a power of attorney executed by a person who had been adjudicated incompetent was void and posed no threat to subsequent good faith purchasers of real property. Potential purchasers are on constructive notice of all information properly recorded in the land and court records of the pertinent county and the relevant special proceedings index. Defendant granddaughter, while serving as her grandmother's guardian, could have petitioned the clerk for the authority to execute the deeds.

Appeal by defendants from order entered 8 August 2016 by Judge Walter H. Godwin in Currituck County Superior Court. Heard in the Court of Appeals 1 May 2017.

G. Elvin Small, III, for plaintiff-appellee.

John M. Kirby for defendants-appellants.[1]

ZACHARY, Judge.

Barbara G. O'Neal was adjudicated incompetent and defendant Pamela Sue O'Neal was appointed as Barbara's general guardian. Pamela was later removed from that position. An attorney was then appointed guardian of Barbara's estate, and the Currituck County Department of Social Services was appointed guardian of Barbara's person. Shortly before Pamela was removed as Barbara's guardian, Barbara executed a power of attorney appointing Pamela as her attorney-in-fact. Acting as Barbara's attorney-in-fact, Pamela executed three deeds transferring real property owned by Barbara to different land trusts. The guardian of Barbara's estate revoked the power of attorney. Barbara, by and through the guardian of her estate (plaintiff),[2] then brought an action to have the power of attorney and the deeds declared void. After plaintiff filed her complaint and defendants filed their answer, the superior court entered an order granting judgment on the pleadings in favor of plaintiff. For the reasons that follow, we affirm the superior court's order.

I. Background

Pamela is the granddaughter of Barbara. In July 2011, Pamela filed a petition to have Barbara, who was seventy-nine years old at the time, adjudicated incompetent. The petition stated, *inter alia*, that Barbara suffered from "a long history of prescription substance abuse[,]" that she had been transferred "to Currituck House Assisted Living," and that she suffered from "[m]ajor [d]epression with chronic anxiety, seizure disorder, memory loss, hypothyroidism[,] and diabetes." Pamela also alleged that Barbara lacked the capacity to handle her financial affairs or to "resist attempts of financial exploitation" by others. As a result, the Currituck County Clerk of Superior Court entered an order on 17 August 2011, which adjudicated Barbara incompetent, retaining no rights or privileges. The order also appointed Pamela as Barbara's general guardian.

Four years later, the clerk revoked Pamela's letters of general guardianship in an order entered 12 October 2015. The clerk found that, as

1. The record indicates that defendant Lori Ann Chappelle is not represented by Mr. Kirby, and this Court's docket sheet specifies that Ms. Chappelle is a *pro se* defendant.

2. In this opinion, we refer to Barbara O'Neal and her guardian collectively as "plaintiff" and to Barbara O'Neal individually as "Barbara."

"the sole heir at law of Barbara O'Neal[,]" Pamela had a "private interest in [Barbara's estate,]" and that "this private interest might tend to hinder or be adverse to Pamela O'Neal in the carrying out of her duties as General Guardian[.]" However, on 10 October 2015, two days before the clerk's revocation order was entered, Barbara executed a durable power of attorney appointing Pamela as her attorney-in-fact. The power of attorney was recorded in the Office of the Currituck County Register of Deeds on 30 October 2015. That same day, two quitclaim deeds were executed by Pamela as attorney-in-fact for Barbara. The first deed conveyed certain real property owned by Barbara to the "Barbara O'Neal Land Trust[,]" and the second deed conveyed a 13.10-acre parcel owned by Barbara to the "Barbara O'Neal Farm Land Trust[.]" On 10 November 2015, Pamela, as attorney-in-fact for Barbara, executed a quitclaim deed conveying Barbara's interest in a 87-acre parcel to the "Barbara O'Neal Barco Land Trust." Pamela was named trustee of all the aforementioned land trusts. All three deeds were recorded in the Office of the Currituck County Register of Deeds.

On 18 November 2015, attorney G. Elvin Small, III was appointed the guardian of Barbara's estate. Acting on behalf of Barbara, Small revoked the October 2015 power of attorney executed in favor of Pamela. Pamela then procured Barbara's signature on a second power of attorney on 4 December 2015, again naming Pamela as Barbara's attorney-in-fact. The second power of attorney, which was also revoked by Small, was not used to conduct any transactions on Barbara's behalf.

On 1 April 2016, Small, as guardian of Barbara's estate, instituted the present action in Currituck County Superior Court seeking, *inter alia*, a judgment declaring both of Pamela's powers of attorney as well as the 30 October 2015 and the 10 November 2015 deeds to be null and void. In her answer to plaintiff's complaint, Pamela admitted that Barbara had been adjudicated incompetent on 17 August 2011, and that Barbara's competence had not been restored. In June 2016, plaintiff filed a motion for judgment on the pleadings pursuant to Rule 12(c) of the North Carolina Rules of Civil Procedure.

A hearing was conducted by Judge Walter H. Godwin, who entered an order granting plaintiff's motion for judgment on the pleadings. The superior court's order, filed 8 August 2016, provided that the two powers of attorney executed by Barbara appointing Pamela as attorney-in-fact were void *ab initio*, as were the three deeds that Pamela executed as Barbara's attorney-in-fact in October and November 2015. The superior court ruled that these instruments were void because they were "executed by Barbara G. O'Neal, a person who was adjudicated incompetent

on August 18, 2011, and whose legal competency has not been restored, or they . . . were executed on her behalf by the attorney in fact named in a power of attorney executed by said incompetent person." Pamela and the other named defendants appeal from the superior court's order granting judgment on the pleadings in favor of plaintiff.

II. Standard of Review

This Court reviews a trial court's ruling on a Rule 12(c) motion for judgment on the pleadings *de novo*. *Toomer v. Branch Banking & Trust Co.*, 171 N.C. App. 58, 66, 614 S.E.2d 328, 335 (2005). Because "[j]udgments on the pleadings are disfavored in law, . . . the trial court must view the facts and permissible inferences in the light most favorable to the non-moving party." *Groves v. Community Hous. Corp.*, 144 N.C. App. 79, 87, 548 S.E.2d 535, 540 (2001) (citation omitted). Even so, judgment on the pleadings "is appropriate when all the material allegations of fact are admitted in the pleadings and only questions of law remain." *Id.* (internal citations and quotation marks omitted).

III. Powers of Attorney

"A power of attorney is an instrument in writing granting power in an agent to transact business for his principal." *Cabarrus Bank & Trust Co. v. Chandler*, 63 N.C. App. 724, 726, 306 S.E.2d 184, 185 (1983) (citations omitted). The agency relationship that results is between "one who gives the power, the principal, and one who exercises authority under the power of attorney, the agent." *Whitford v. Gaskill*, 119 N.C. App. 790, 793, 460 S.E.2d 346, 348 (1995), *rev'd on other grounds*, 345 N.C. 475, 480 S.E.2d 690 (1997). Any act performed by the agent is as if the principal had performed it. *See Branch Banking and Trust Co. v. Creasy*, 301 N.C. 44, 56, 269 S.E.2d 117, 124 (1980) ("An agent is one who acts for or in the place of another by authority from him."). Although special rules apply to the fiduciary relationship between a principal and agent, there is, as a general matter, little reason to draw distinctions between powers of attorney and contracts. *See Hedgepeth v. Home Savs. & Loan Ass'n*, 87 N.C. App. 610, 612, 361 S.E.2d 888, 890 (1987) (determining that power of attorney at issue "should be treated the same as any other contract") (citations omitted); 12 *Williston on Contracts* § 35:1, at 202 (4th ed. 2012) ("An agency contract is formed according to the same rules that are applicable to any other contract; an agency is created in much the same manner as a contract is made, in that the agency results from an agreement between the principal and the agent to serve in that capacity."). As a result, we will apply general principles of contract law to the power of attorney that Barbara executed appointing Pamela her attorney-in-fact.

IV. Discussion

[1] Defendants' principal argument on appeal is that the superior court erred in declaring Pamela's first power of attorney (and the deeds she executed pursuant to that power) void *ab initio*. According to defendants, "[a]lthough a person declared incompetent lacks the capacity to enter contracts, such that contracts are *voidable* . . . , an incompetent person retains many rights and powers to direct their care and finances." In support of this assertion, defendants cite case law holding that allegations concerning an incompetent person's ability to make a will or enter into marriage merely create an issue of fact as to whether the person possessed the necessary capacity to make the transaction at the time it was made. *See Geitner v. Townsend*, 67 N.C. App. 159, 312 S.E.2d 236 (1984); *In re Will of Maynard*, 64 N.C. App. 211, 307 S.E.2d 416 (1983). We disagree, and find that *Geitner* is inapposite to this case and that *Maynard* actually cuts against defendants' argument.

In *Geitner*, a man married a woman after he had been adjudicated incompetent and placed under guardianship, and the question on appeal was whether the jury properly determined that the man had sufficient mental capacity to enter into the marriage. 67 N.C. App. at 160-161, 312 S.E.2d at 237-38. This Court went on to affirm the judgment entered upon the jury's verdict finding that the man had sufficient mental capacity to contract a valid marriage. *Id.* at 162, 312 S.E.2d at 239. In doing so, the *Geitner* Court specifically observed that " '*unlike other transactions*, an insane person's capacity to marry is not necessarily affected by guardianship . . . . (R)easons why guardianship removes from the insane person *all capacity to contract* do not apply to marriage.' " *Id.* (emphasis added) (quoting *Lee's North Carolina Family Law*, § 24 n. 119 (4th ed. 1979) (citation omitted). Thus, the capacity to marry stands on an entirely different footing than one's ability to make contracts or appoint agents.

In *Maynard*, the testatrix executed a will, was later adjudicated incompetent, and then executed a second will expressly revoking the first will. 64 N.C. App. at 212, 307 S.E.2d at 419. In the caveat proceeding, the trial court submitted to the jury the issue of which will should be admitted to probate, and the jury found that the second will was a valid Last Will and Testament. This Court affirmed. After noting that there is a presumption "that a testator possessed testamentary capacity" and that any party alleging otherwise bears the burden of proving a lack of capacity, *id.* at 225, 307 S.E.2d at 426, the *Maynard* Court determined that a declaration that one is incompetent to manage his affairs does not, by itself, establish a lack of testamentary capacity; rather, it is simply

prima facie evidence of incapacity. *Id.* at 225, 307 S.E.2d at 427. In this way, the Court drew a critical distinction between the capacity to manage one's own affairs and the capacity to make a will:

> [W]here a person has been declared incompetent to *manage his affairs*, and a guardian appointed, the person is presumed to lack mental capacity to *manage his affairs*, and *this presumption is conclusive as to parties and privies to the guardianship proceedings* and rebuttable as to all others. As to *testamentary capacity*, a person for whom a guardian has been appointed is presumed "*in the absence of proof to the contrary*" to lack *testamentary capacity*. The presumption as to *testamentary incapacity* is necessarily a rebuttable one, or there could be no "proof to the contrary."

Id. at 225, 307 S.E.2d at 426-27 (third emphasis added).

Under the rules set forth in *Maynard*, a person who has been declared incompetent and placed under a guardianship may possess sufficient testamentary capacity, but the adjudication of incompetence conclusively establishes the person's incapacity to manage his affairs as to parties to the guardianship proceedings. In the present case, Pamela was not only a party to Barbara's initial guardianship proceeding, *Pamela instituted the guardianship proceedings and served as Barbara's guardian for four years*. Barbara's incapacity was, therefore, conclusively established as to Pamela. Accordingly, we examine the effect of Barbara's adjudication of incompetency on her capacity to execute a power of attorney, and Pamela's authority to execute deeds as Barbara's attorney-in-fact.

After a careful examination of the relevant North Carolina jurisprudence, we find that the following principles apply to this case. Although "[t]he law presumes that every person is sane in the absence of evidence to the contrary[,] . . . after a person has . . . been found to be mentally incompetent[,] there is a presumption that the mental incapacity continues." *Davis v. Davis*, 223 N.C. 36, 38, 25 S.E.2d 181, 183 (1943). Ordinarily, when a mentally incompetent person executes a contract or deed before their condition has been formally declared, the resulting agreement or transaction is voidable and not void. *E.g.*, *Chesson v. Pilot Life Ins. Co.*, 268 N.C. 98, 102, 150 S.E.2d 40, 43 (1966); *Reynolds v. Earley*, 241 N.C. 521, 524, 85 S.E.2d 904, 906 (1955); *Wadford v. Gillette*, 193 N.C. 413, 420, 137 S.E. 314, 317 (1927). But a contract or deed executed after a person has been adjudicated incompetent is absolutely void absent proof that

the person's mental capacity was restored prior to executing the instrument. *Tomlins v. Cranford*, 227 N.C. 323, 326, 42 S.E.2d 100, 101 (1947); *Wadford*, 193 N.C. at 420, 137 S.E. at 317.

As mentioned above, we treat the power of attorney at issue in this case the same as any other contract. Under *Maynard*, the clerk's 2011 order, which formally adjudicated Barbara incompetent and placed her under a guardianship, conclusively established (as to Pamela) Barbara's incapacity to enter into legally-binding contracts. In other words, this incapacity was established as a matter of law. Because there is no evidence in the record that Barbara's competency was restored before she executed the power of attorney on 10 October 2015, the power of attorney was a nullity and of no legal effect. As such, Pamela had no legal authority to act as Barbara's attorney-in-fact when she executed the three deeds at issue and purported to convey property to the relevant land trusts of which she was trustee. Our conclusion rests upon the notion that when the principal is adjudicated incompetent before executing a power of attorney in favor of the agent, the principal cannot give a legally operative consent, and no agency relationship results. Accordingly, because Barbara's power of attorney and the deeds that Pamela executed pursuant to it were void *ab initio*, the superior court properly granted judgment on the pleadings in favor of plaintiff.

[2] Finally, we address two concerns that arise from defendants' arguments on appeal. First, defendants concern for innocent third parties is misplaced. Concluding that a power of attorney executed by a person who has been adjudicated incompetent is void poses no threat to subsequent good faith purchasers of real property. Indeed, it is already well established that a deed executed by a person who has been judicially declared incompetent is void. *Tomlins*, 227 N.C. at 326, 42 S.E.2d at 101; *Wadford*, 193 N.C. at 420, 137 S.E. at 317. Beyond that, a diligent potential purchaser of real property would discover an attorney-in-fact's inability to execute a valid deed on behalf of a previously-adjudicated incompetent person via the court order adjudicating the person to be incompetent, to be found in the special proceedings index. Potential purchasers are on constructive notice of all information properly recorded in the land and court records of the county in which the property is located as well as the relevant special proceedings index. *See Stegall v. Robinson*, 81 N.C. App. 617, 619, 344 S.E.2d 803, 804 (1986) ("A purchaser . . . has constructive notice of all duly recorded documents that a proper examination of the title should reveal.").

Second, defendants proclaim that "[c]onsistent with the public policy of North Carolina, Barbara O'Neal should be able to appoint her

granddaughter as her power of attorney, and to instruct her as to how she wants her property handled." However, the court and Pamela agreed that Barbara was unable to manage her financial affairs. Moreover, Pamela may have made the conveyances pursuant to this State's guardianship statutes, if doing so would have "materially promoted" Barbara's interests. Pamela, while serving as Barbara's guardian, could have petitioned the clerk for the authority to execute the deeds. *See* N.C. Gen. Stat. § 35A-1301(b) (2015) (permitting a guardian to apply to the clerk to, *inter alia*, "sell . . . any part of his ward's real estate," and authorizing the clerk to "order a sale . . . to be made by the guardian in such way and on such terms that may be most advantageous to the interest of the ward, upon finding by satisfactory proof that" the guardian's application meets certain criteria). What Pamela could *not* do was sign the deeds pursuant to a power of attorney that was executed well after Barbara was adjudicated incompetent.

V. Conclusion

For the reasons explained above, we conclude that Barbara's adjudication of incompetency rendered her incapable of executing a legally operative power of attorney. The power of attorney was void. Consequently, the deeds that Pamela executed as Barbara's attorney-in-fact were also void, and the superior court properly granted plaintiff's motion for judgment on the pleadings. The order of the superior court is affirmed.

AFFIRMED.

Chief Judge McGEE and Judge HUNTER, JR. concur.

STATE OF NORTH CAROLINA
v.
ROBERT JEROME COBB, DEFENDANT, SURETY: ULONDA T. HILL,
BAIL AGENT FOR 1ST ATLANTIC SURETY COMPANY; JUDGMENT CREDITOR: WATAUGA
COUNTY BOARD OF EDUCATION

No. COA16-990

Filed 5 July 2017

Penalties, Fines, and Forfeitures—forfeiture of appearance bond—missing documentation to support grounds

The trial court lacked statutory authority under N.C.G.S. § 15A-544.5 to set aside a forfeiture of an appearance bond in the amount of $30,000 where it did not contain the required documentation to support any ground set forth. The bail agent erroneously submitted an ACIS printout that did not meet the requirement of a sheriff's receipt (evidence defendant was surrendered by a surety) on the bail bond rather than the required AOC-CR-214 form.

Judge ZACHARY dissenting.

Appeal by judgment creditor from order entered 6 July 2016 by Judge Gary M. Gavenus in Watauga County Superior Court. Heard in the Court of Appeals 7 March 2017.

No brief was filed for Surety 1st Atlantic Surety Company.

Miller & Johnson, PLLC, by Nathan A. Miller, for Judgment Creditor Watauga County Board of Education.

BRYANT, Judge.

Where the motion to set aside the forfeiture of an appearance bond did not contain the required documentation to support any ground set forth in North Carolina General Statutes, section 15A-544.5, the trial court lacked statutory authority to set aside the forfeiture of the appearance bond. Accordingly, we vacate the trial court's order setting aside the forfeiture of the bond.

An appearance bond in the amount of $30,000.00 was placed for Robert Jerome Cobb to appear in Watauga County Superior Court on 12 January 2016 on a felony charge in case number 15 CRS 050271. Due

to Cobb's failure to appear, the Honorable Gary M. Gavenus, Superior Court judge, ordered that Cobb's $30,000.00 appearance bond in that case be forfeited. On 14 January 2016, a Deputy Clerk of Watauga County Superior Court issued a bond forfeiture notice to Cobb, as well as to 1st Atlantic Surety Company via first-class mail. On 8 June 2016, Ulonda Hill, a bail agent, moved the court to set aside the forfeiture. In the motion, which was filed on form AOC-CR-213—a form with pre-set options and check boxes—Hill checked that "defendant has been surrendered by a surety on the bail bond as provided by G.S. 15A-540, as evidenced on the attached 'Surrender Of Defendant By Surety' (AOC-CR-214)." However, instead of a Form CR-214, attached to the motion was a printout from the Automated Criminal/Infractions System (ACIS). On 14 June 2016, an attorney for the school board filed an objection and notice of hearing. The hearing was set for 5 July 2016. On 6 July 2016, the trial court entered an order finding "that the moving party has established one or more of the reasons specified in G. S. 15A-544.5 for setting aside the forfeiture. . . . The . . . Motion is allowed and the forfeiture is set aside." Judgment creditor Watauga County Board of Education ("the Board") appeals.

On appeal, the Board argues that the trial court erred by finding that the moving party established a reason for setting aside the bond forfeiture, pursuant to N.C. Gen. Stat. § 15A-544.5. More specifically, the Board contends that by submitting an ACIS printout rather than the required AOC-CR-214 form, the bail agent failed to comply with section 15A-544.5 in seeking to aside the bond forfeiture. We agree in part.

General Statutes Chapter 15A, Article 26, Part 2 governs bail bond forfeiture. "By executing a bail bond the defendant and each surety submit to the jurisdiction of the court. . . . The liability of the defendant and each surety may be enforced as provided in this Part . . . ." N.C. Gen. Stat. § 15A-544.1 (2015). "If a defendant . . . released . . . upon execution of a bail bond fails on any occasion to appear before the court as required, the court shall enter a forfeiture for the amount of that bail bond . . . ." *Id.* § 15A-544.3(a). "There shall be no relief from a forfeiture except as provided in [section 15A-544.5]." *Id.* § 15A-544.5(a); *see also State v. Williams*, 218 N.C. App. 450, 451, 725 S.E.2d 7, 9 (2012) (holding where forfeiture of an appearance bond has not become a final judgment, G.S. § 15A-544.5 offers "[t]he exclusive avenue for relief"); *State v. Sanchez*, 175 N.C. App. 214, 623 S.E.2d 780 (2005) (holding the trial court lacked authority to grant the surety's motion to set aside forfeiture of an appearance bond where the motion was not premised on any ground set forth in G.S. § 15A-544.5).

Pursuant to subsection (b) of General Statutes, section 15A-544.5,

> Except as provided by subsection (f)[(which is not applicable here)] . . . a forfeiture shall be set aside for any one of the following reasons, and none other:
>
> (1) The defendant's failure to appear has been set aside by the court and any order for arrest issued for that failure to appear has been recalled, as evidenced by a copy of an official court record, including an electronic record.
>
> (2) All charges for which the defendant was bonded to appear have been finally disposed by the court other than by the State's taking dismissal with leave, as evidenced by a copy of an official court record, including an electronic record.
>
> (3) *The defendant has been surrendered by a surety on the bail bond as provided by G.S. 15A-540, as evidenced by the sheriff's receipt provided for in that section.*
>
> (4) The defendant has been served with an Order for Arrest for the Failure to Appear on the criminal charge in the case in question as evidenced by a copy of an official court record, including an electronic record.
>
> (5) The defendant died before or within the period between the forfeiture and the final judgment as demonstrated by the presentation of a death certificate.
>
> (6) The defendant was incarcerated in a unit of the Division of Adult Correction of the Department of Public Safety and is serving a sentence or in a unit of the Federal Bureau of Prisons located within the borders of the State at the time of the failure to appear as evidenced by a copy of an official court record or a copy of a document from the Division of Adult Correction of the Department of Public Safety or Federal Bureau of Prisons, including an electronic record.
>
> (7) The defendant was incarcerated in a local, state, or federal detention center, jail, or prison located anywhere within the borders of the United States at the time of the failure to appear, and the district attorney for the county in which the charges are pending was notified of the defendant's incarceration while the defendant was still

> incarcerated and the defendant remains incarcerated for a period of 10 days following the district attorney's receipt of notice, as evidenced by a copy of the written notice served on the district attorney via hand delivery or certified mail and written documentation of date upon which the defendant was released from incarceration, if the defendant was released prior to the time the motion to set aside was filed.

N.C.G.S. § 15A-544.5(b) (emphasis added). Within 150 days of the notice of forfeiture being given, the defendant, surety, professional bondsman, or bail agent may move for the bond forfeiture to be set aside. "[A] written motion shall state the reason for the motion and attach to the motion the evidence specified in subsection (b) of this section." *Id.* § 15A-544.5(d)(1).

The record before us indicates that the bail agent moved to set aside the bond forfeiture on the ground that "defendant has been surrendered by a surety on the bail bond as provided by G.S. 15A-540, as evidenced by the attached 'Surrender of Defendant By Surety' (AOC-CR-214)" (ground (b)(3) under section 15A-544.5). However, no AOC form 214 was attached to the motion. Instead, attached to the motion was an ACIS printout indicating that defendant had been charged with a traffic offense, driving while license revoked, on 18 May 2015 and that the disposition date was 18 May 2016. The ACIS printout reflected that the traffic charge was assigned Watauga case number 15 CR 00508, that defendant pled guilty to the charge on 18 May 2016, and that, as part of the disposition, defendant agreed to plead guilty in Watauga case number 14 CRS 50747. The ACIS printout included no reference to case number 15 CRS 050271, the case in which the bond was forfeited. The ACIS printout did not indicate that defendant was taken into custody or had been surrendered to a sheriff or other agency official authorized to arrest individuals.

The issue now before us is whether the trial court erred by setting aside the bond forfeiture where the record reflects only the ACIS statement as evidence "defendant has been surrendered by a surety on the bail bond," in lieu of a sheriff's receipt.[1] *See id.* § 15A-544.5(b)(3). We

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1. The Board argues that the failure to attach the specific form AOC-CR-214 as evidence of surrender to the sheriff by a surety amounts to a failure to meet the statutory requirement of a sheriff's receipt set out in section 15A-544.5(b)(3). However, we need not reach this specific issue to resolve the matter before us. *See Hayes v. City of Wilmington*, 243 N.C. 525, 536, 91 S.E.2d 673, 682 (1956) ("In every case what is actually decided is the law applicable to the particular facts; all other legal conclusions therein are but *obiter dicta*.").

hold the ACIS statement in the instant case did not meet the requirement of a sheriff's receipt contemplated by the statute; i.e., evidence defendant was surrendered by a surety on the bail bond. We note that bail agent Hill's motion to set aside the forfeiture of an appearance bond was premised on section 15A-544.5(b)(3), but where the facts of record do not support the asserted ground for the motion or any other ground set forth in subsection (b), we see no basis on this record for the trial court to exercise statutory authority to set aside the bond forfeiture.

The dissenting opinion asserts that because "there is no evidence upon which to assess the validity of the trial court's ruling, we should not presume that the trial court erred but should instead affirm the trial court's order." In particular, the dissent cites *Phelps v. McCotter*, 252 N.C. 66, 67, 112 S.E.2d 736, 737 (1960) (per curiam), for the "well established principle that there is a presumption in favor of the regularity and validity of the proceedings in the lower court"; *King v. King*, 146 N.C. App. 442, 445–46, 552 S.E.2d 262, 265 (2001) ("[I]t is generally the appellant's duty and responsibility to see that the record is in proper form and complete and this Court will not presume error by the trial court *when none appears on the record to this Court*." (emphasis added) (citation omitted); and *Granville Med. Ctr. v. Tipton*, 160 N.C. App. 484, 488–89, 586 S.E.2d 791, 795 (2003) (stating that "[w]here the record is silent on a particular point, we presume that the trial court acted correctly," then holding this Court would not presume the trial court erred by applying an incorrect legal standard where the record was silent as to which standard the lower court applied). We note *In re A.R.H.B.*, for the proposition that "[u]nless the record reveals otherwise, we presume that judicial acts and duties have been duly and regularly performed." 186 N.C. App. 211, 219, 651 S.E.2d 247, 253 (2007) (citation omitted). However, here, the record is not silent; the record reflects only error. For that reason, *King*, *Phelps*, *Granville*, and *A.R.H.B.* are distinguishable.

The dissenting opinion points out that the record before this Court does not include a transcript or a Rule 9(a) narration of any proceedings before the trial court. The majority does acknowledge herein that as the appellant, the Board of Education had a duty to provide a complete record and that failure to do so should be met with strong disapproval. However, appellant Board compiled a proposed record on appeal, and when the time for response to appellant Board's proposed record expired without comment from the surety, the record was settled by operation of the Rules of Appellate Procedure. Thereafter, only appellant Board filed a brief in this matter.

The record as submitted by appellant Board shows error on its face. Unlike the dissent, we will not speculate on what if anything else *may* have occurred before the trial court. *See Joines v. Moffitt*, 226 N.C. App. 61, 67, 739 S.E.2d 177, 182 (2013) (stating that "[a]ppellate review is based solely upon the record on appeal; it is the duty of the appellant[] to see that the record is complete. This Court will not engage in speculation as to what arguments may have been presented . . . ." (alteration in original) (citation omitted)). This record as reviewed on appeal and argued by appellant, contains documentary evidence which, on its face, does not support the ruling of the trial court. The evidence of record shows the bail agent presented to the court a printout showing that defendant had been charged with a misdemeanor traffic offense on 18 May 2015, almost eight months prior to his failure to appear on 12 January 2016. Further, the printout did not reflect that defendant had been incarcerated on 12 January 2016 or at any subsequent time up to the date of the bond hearing. Thus, based on this record, error does appear and we cannot presume the court acted in accordance with statutory authority. *Cf. In re A.R.H.B.*, 186 N.C. App. at 219, 651 S.E.2d at 253 ("Unless the record reveals otherwise, we presume that judicial acts and duties have been duly and regularly performed." (citation omitted)). This record supports a conclusion, not a presumption, that the trial court erred, as there is not sufficient basis in the record to warrant the exercise of statutory authority to set aside a bond forfeiture. Accordingly, the trial court's 6 July 2016 order allowing the bail agent's motion to set aside the bond forfeiture is

VACATED.

Judge INMAN concurs.

Judge ZACHARY dissents with a separate opinion.

Judge ZACHARY, dissenting.

The majority opinion holds that the motion filed by 1st Atlantic Surety Company ("the surety") to set aside the forfeiture of an appearance bond "was not premised upon any ground set out under [N.C. Gen. Stat. §] 15A-544.5" and that, as a result, "the trial court lacked statutory authority to set aside the forfeiture of the appearance bond." The surety's original motion was explicitly based upon N.C. Gen. Stat. § 15A-544.5(b)(3) (2015), which allows a surety to apply to have a bond forfeiture set aside on the grounds that "[t]he defendant has been surrendered by a surety on the bail bond as provided by G.S. 15A-540, as evidenced by the sheriff's

receipt provided for in that section." Therefore, the issue litigated at the hearing before the trial court was not whether the surety's motion to set aside the bond forfeiture was premised upon an authorized basis, but whether the surety properly supported its motion by producing the appropriate documentation.

The record establishes that Robert Cobb was charged with an unspecified criminal offense in Watauga County File No. 15 CRS 50271, and that a secured appearance bond was set at $30,000, for which the surety posted bond for Mr. Cobb. Mr. Cobb failed to appear in court on the scheduled trial date of 12 January 2016, and on 14 January 2016 forfeiture of the bond was ordered and the surety was notified. On 8 June 2016, the surety moved to have the bond forfeiture set aside. Upon the objection of the Watauga County Board of Education ("appellant") to the surety's motion to set aside the forfeiture of the bond, a hearing on the surety's motion was conducted by the Honorable Gary M. Gavenus of the Superior Court of Watauga County. The appellant has appealed from an order of the trial court ruling that the surety had established the existence of one or more statutorily-permissible reasons for setting aside the bond forfeiture. The question before this Court is whether this order was supported by evidence adduced at the hearing *conducted by the trial court*. However, the record on appeal does not include any information concerning the testimony, evidence, or arguments presented at that hearing. Given the complete absence of any record of the evidence presented to the trial court, any conclusion reached by this Court regarding the merits of the trial court's order will, of necessity, be based upon assumption or speculation. That is, we can either presume that the trial court acted correctly, or presume that the court erred. It is a long-standing rule of our appellate courts that we do not presume error upon a silent record. "In *State v. Fennell*, 307 N.C. 258, 262, 297 S.E.2d 393, 396 (1982), this Court noted the presumption of regularity in a trial, stating that 'where the record is silent on a particular point, it will be presumed that the trial court acted correctly.' " *State v. Thomas*, 344 N.C. 639, 646, 477 S.E.2d 450, 453 (1996). Because the majority's holding is based upon the presumption that the trial court erred, I must respectfully dissent.

It is undisputed that "[i]n North Carolina, forfeiture of an appearance bond is controlled by statute." *State v. Robertson*, 166 N.C. App. 669, 670, 603 S.E.2d 400, 401 (2004). "If a defendant who was released . . . upon execution of a bail bond fails on any occasion to appear before the court as required, the court shall enter a forfeiture for the amount of that bail bond in favor of the State against the defendant and against each surety on the bail bond." G.S. § 15A-544.3(a) (2015). "The exclusive

avenue for relief from forfeiture of an appearance bond . . . is provided in G.S. § 15A-544.5. The reasons for setting aside a forfeiture are those specified in subsection (b)[.]" *Robertson*, 166 N.C. App. at 670-71, 603 S.E.2d at 401. N.C. Gen. Stat. § 15A-544.5 "clearly states that 'there shall be no relief from a forfeiture' except as provided in the statute, and that a forfeiture 'shall be set aside for any one of the [reasons set forth in Section (b)(1-7)], and none other.' " *State v. Sanchez*, 175 N.C. App. 214, 218, 623 S.E.2d 780, 782 (2005).

N.C. Gen. Stat. § 15A-544.5 provides in relevant part that the procedure governing a surety's request to have a bond forfeiture set aside is as follows:

> (1) . . . [A]ny of the following parties on a bail bond may make a written motion that the forfeiture be set aside: . . . Any surety. . . . The written motion shall state the reason for the motion and attach to the motion the evidence specified in subsection (b) of this section.
>
> (2) The motion shall be filed in the office of the clerk of superior court[.] . . . The moving party shall, under G.S. 1A-1, Rule 5, serve a copy of the motion on the district attorney for that county and on the attorney for the county board of education.
>
> (3) Either the district attorney or the county board of education may object to the motion by filing a written objection in the office of the clerk and serving a copy on the moving party.
>
> (4) If neither the district attorney nor the attorney for the board of education has filed a written objection to the motion by the twentieth day after a copy of the motion is served by the moving party . . . the clerk shall enter an order setting aside the forfeiture, regardless of the basis for relief asserted in the motion, the evidence attached, or the absence of either.
>
> (5) If either the district attorney or the county board of education files a written objection to the motion, then . . . a hearing on the motion and objection shall be held in the county, in the trial division in which the defendant was bonded to appear.
>
> (6) If at the hearing the court allows the motion, the court shall enter an order setting aside the forfeiture.

> (7) If at the hearing the court does not enter an order setting aside the forfeiture, the forfeiture shall become a final judgment of forfeiture[.]
>
> (8) If at the hearing the court determines that the motion to set aside was not signed or that the documentation required to be attached pursuant to subdivision (1) of this subsection is fraudulent or was not attached to the motion at the time the motion was filed, the court may order monetary sanctions against the surety filing the motion, unless the court also finds that the failure to sign the motion or attach the required documentation was unintentional. . . .

"The standard of review on appeal where a trial court sits without a jury is whether there was competent evidence to support the trial court's findings of fact and whether its conclusions of law were proper in light of such facts." *State v. Lazaro*, 190 N.C. App. 670, 660 S.E.2d 618 (2008) (citation omitted). N.C. Gen. Stat. § 15A-544.5(h) states that an "order on a motion to set aside a forfeiture is a final order or judgment of the trial court for purposes of appeal. Appeal is the same as provided for appeals in civil actions." Accordingly, this Court has reviewed appeals from a trial court's ruling on a motion to set aside a bond forfeiture in the same manner as other orders or judgments entered in a bench trial.

For example, in *Lazaro*, the surety moved to have the bond forfeiture set aside on the grounds that the defendant had failed to appear in court because he was incarcerated in a state or federal prison, which is listed in N.C. Gen. Stat. § 15A-544.5(b)(6) as a permissible basis to have a bond forfeiture set aside. On appeal, the Board of Education argued that the "surety's evidence does not support a finding that the defendant was incarcerated . . . within the borders of North Carolina at the time of his failure to appear on 7 November 2006." *Lazaro*, 190 N.C. App. at 671, 660 S.E.2d at 619. We reviewed the evidence that the surety had proffered, which consisted of "computer printouts of inmate records from the Mecklenburg County Sheriff's Office[.]" *Lazaro* at 673, 660 S.E.2d at 620. Based upon the evidence offered at the hearing, we concluded that "the trial court's findings were not supported by competent evidence" given that "[t]he surety presented no additional evidence other than the printouts." *Id.*

Similarly, in *State v. Belton*, 169 N.C. App. 350, 610 S.E.2d 283 (2005), the surety moved to set aside a final judgment of forfeiture, on the grounds that the surety had never been given notice of the forfeiture. At the hearing, the surety produced an affidavit from its employee which

"tended to show that [the] surety did not receive the notice of forfeiture[.]" *Belton*, 169 N.C. App. at 357, 610 S.E.2d at 288. Other testimony was offered by an Assistant Clerk of Court, who testified in detail concerning the practices of the Clerk's office with regard to mailing notices of forfeiture. We held that the trial court, "after considering [the surety's affidavit] along with the other evidence in the record, could properly conclude that the clerk had given notice[.]" *Id.* Thus, in our review of appeals from a trial court's ruling on a motion to set aside a bond forfeiture, as in all other appeals from a bench trial, we review whether the evidence supported the trial court's findings and whether these findings supported its conclusions of law.

In this case, the surety filed a motion to set aside the bond forfeiture on 8 June 2016 using an Administrative Office of the Courts (AOC) Form AOC-CR-213, on which the surety indicated that it sought to have the bond forfeiture set aside on the grounds that "[t]he defendant has been surrendered by a surety on the bail bond as provided by G.S. 15A-540, as evidenced by the attached Surrender of Defendant by Surety (AOC-CR-214)." The surety attached to the motion a computer printout from the Watauga County Sheriff's Office, referred to as an ACIS form. The majority holds that the surety's use of an ACIS form did not satisfy the requirement of N.C. Gen. Stat. § 15A-544.5(b)(3) that the surety produce a "sheriff's receipt." Examination of the attachment submitted by the surety reveals that it references two Watauga County criminal cases, identified as Files Nos. 15 CR 508 and 14 CRS 50747. The form does not, however, contain information about the disposition of the offense charged in File No. 15 CRS 50271, which is the subject of the present appeal. As a result, regardless of whether an ACIS form might, as a general proposition, satisfy the requirement that a surety attach a "sheriff's receipt" to a motion to have a bond forfeiture set aside, it appears that the specific ACIS form submitted in this case would not establish that Mr. Cobb had been surrendered to the sheriff with respect to File No. 15 CRS 50271.

However, the holding that the trial court erred by setting aside the bond forfeiture is based exclusively upon the documentation that the surety attached to the motion that was submitted to the clerk of court. On the facts of this case, we should not reach the issue of whether an ACIS form might meet the definition of a sheriff's receipt.

On 14 June 2016, the appellant filed its objection to the surety's motion, and a hearing was scheduled for 5 July 2016. The matter was heard by Judge Gavenus in Watauga County Superior Court on 5 July 2016. On 6 July 2016, Judge Gavenus entered an order allowing the

surety's motion and setting aside the bond forfeiture, based upon a finding and conclusion that:

> Upon due notice, *a hearing was held* on the above Objection to the Motion To Set Aside Forfeiture. The Court finds on the "Date of Bond" shown on the reverse the moving party named above executed a bond for the defendant's appearance in the case(s) identified[.] . . . On the "Failure to Appear" date shown on the reverse, the defendant failed to appear to answer the charges in the case(s), and forfeiture of the bond was entered on that date. Notice of forfeiture was mailed to the moving party[.] . . .
>
> *The Court finds . . . that the moving party has established one or more of the reasons specified in [N.C. Gen. Stat. §] 15A-544.5 for setting aside that forfeiture.* . . . The above Motion is allowed and the forfeiture is set aside.
>
> (emphasis added).

As discussed above, the only relevant issue before this Court is whether the trial court's order was properly entered in light of the evidence adduced at the hearing. The propriety of the trial court's order cannot be determined merely by review of the documentation that the surety attached to its motion, because the trial court's order was entered following a hearing at which the parties would have been allowed to present additional testimony or evidence.

This Court has often held that " '[i]t is the appellant's duty and responsibility to see that the record is in proper form and complete.' " *State v. Williamson*, 220 N.C. App. 512, 516, 727 S.E.2d 358, 361 (2012) (quoting *State v. Alston*, 307 N.C. 321, 341, 298 S.E.2d 631, 644 (1983)). There are several ways in which the appellant might have created a record of the hearing before the trial court. The clearest record is often established by a transcript of the proceedings. In the event that a transcript is unavailable, N.C. R. App. P. 9(c)(1) (2015) permits a party to prepare a narration of the proceedings. In the course of settling the record on appeal, pursuant to N.C. R. App. P. 11 (2015), the appellant might have submitted an affidavit from the appellant's trial counsel regarding the evidence that the surety submitted at the hearing, or if the parties agreed on the evidentiary history of this matter, they might have stipulated to the identity of the documents or testimony offered at the hearing. Alternatively, the appellant might have filed a motion pursuant to N.C. Gen. Stat. § 1A-1, Rule 52(b) (2015), asking the court to "amend its findings or make additional findings[.]"

Unfortunately, in this case the appellate record does not contain any indication of the evidence or testimony offered at the hearing in addition to, or instead of, the ACIS statement attached to the surety's motion. The record fails to include a transcript of the hearing conducted by the trial court, a reconstruction by the parties of the events that transpired at the hearing, an affidavit attesting to the testimony and documentary evidence proffered before the trial court, or any other evidence from which we might determine what evidence was presented by the parties at the hearing.

"[I]t is generally the appellant's duty and responsibility to see that the record is in proper form and complete and this Court will not presume error by the trial court when none appears on the record to this Court." *King v. King*, 146 N.C. 442, 445-46, 552 S.E.2d 262, 264 (2001) (internal quotation omitted). Instead, "[w]here the record is silent on a particular point, we presume that the trial court acted correctly." *Granville Med. Ctr. v. Tipton*, 160 N.C. App. 484, 488-89, 586 S.E.2d 791, 795 (2003) (citing *State v. Reaves*, 132 N.C. App. 615, 620, 513 S.E.2d 562, 565 (1999)). *See also Phelps v. McCotter*, 252 N.C. 66, 67, 112 S.E.2d 736, 737 (1960) (noting the "well established principle that there is a presumption in favor of the regularity and validity of the proceedings in the lower court").

The majority opinion states that the "record as submitted by appellant Board shows error on its face." In fact, the record provides nothing regarding the only pertinent question, which is the evidence provided by the surety *at the hearing before the trial court*. " 'The longstanding rule is that there is a presumption in favor of regularity and correctness in proceedings in the trial court, with the burden on the appellant to show error.' Unless the record reveals otherwise, we presume 'that judicial acts and duties have been duly and regularly performed.' " *In re A.R.H.B.*, 186 N.C. App. 211, 219, 651 S.E.2d 247, 253 (2007) (quoting *L. Harvey & Son Co. v. Jarman*, 76 N.C. App. 191, 195-96, 333 S.E.2d 47, 50 (1985), and *Lovett v. Stone*, 239 N.C. 206, 212, 79 S.E.2d 479, 483 (1954)). The majority holds that the documentation provided by the surety to the clerk requires a "conclusion, not a presumption" that the trial court erred. This conclusion ignores the crucial fact that we are not reviewing a determination by the clerk of court, but by the *trial court following a hearing* at which the parties had an opportunity to offer testimony and documentary evidence. It is impossible for us to reach a conclusion on the validity of the trial court's order without a record of what transpired at the hearing.

In the absence of any record of the proceedings before the trial court, this Court should follow the well-established rule and should not presume that the trial court erred. I believe that because there is no evidence upon which to assess the validity of the trial court's ruling, we should not presume that the trial court erred but should instead affirm the trial court's order. For this reason, I must respectfully dissent.

STATE OF NORTH CAROLINA
v.
MICHAEL AYODEJI FALANA, DEFENDANT

No. COA16-1306

Filed 5 July 2017

Conversion—felony—motion to dismiss—sufficiency of evidence—ownership—fatal variance between indictment and evidence

The trial court erred by denying defendant car business owner's motion to dismiss the charge of felony conversion under N.C.G.S. § 14-168.1 where the State failed to establish ownership, an essential element of felony conversion. There was a fatal variance between the indictment and the evidence presented at trial regarding ownership of a vehicle since the indictment charged defendant with a crime against someone who did not have title to the pertinent vehicle.

Appeal by Michael Ayodeji Falana from judgment entered 14 January 2016 by Judge Donald W. Stephens in Wake County Superior Court. Heard in the Court of Appeals 17 May 2017.

Attorney General Joshua H. Stein, by Assistant Attorney General M. Denise Stanford, for the State.

Appellate Defender Glenn Gerding, by Assistant Appellate Defender Jillian C. Katz, for the Defendant.

MURPHY, Judge.

Michael Ayodeji Falana ("Defendant") appeals from the judgment below in which a jury found him guilty of felony conversion. Defendant argues that the trial court erred by denying his Motion to Dismiss

because: (1) the State failed to establish an essential element of felony conversion; and (2) the State's evidence at trial fatally varied from the indictment. Defendant argues further that the trial court's jury instructions were in error because: (1) the trial judge instructed the jury on felony conversion based on the evidence presented at trial, which fatally varied from the indictment; (2) the trial court answered a question from the jury in violation of N.C.G.S. § 15A-1234(c) (2015); and (3) the trial court's supplemental instruction in response to a question from the jury was legally erroneous and resulted in a coerced verdict. We agree with Defendant that the trial court erred by denying Defendant's Motion to Dismiss, and vacate the judgment.

Background

In 2011, Defendant opened a business, Micdina Motors, that buys cars at live and online auctions. To carry out his business, Defendant subscribed to various online auction sites, including Copart. Copart is a marketing company that liquidates total loss vehicles through online auctions. Only members that have provided proof of licensing and paid associated fees can access and participate in Copart's auctions.

Around 2012, Defendant permitted Mr. Olamide Olamosu ("Olamosu") to use his auction accounts for Olamosu to conduct his own business in exchange for a portion of Olamosu's sales. Defendant also permitted Olamosu to register as a licensed sales representative with Micdina Motors at the North Carolina Department of Motor Vehicles. Although Olamosu's transactions went through Defendant's online accounts and he had access to one of Micdina Motors' email accounts, Defendant testified that Olamosu generally did not discuss his customers with Defendant in detail.

In May or June 2013, Olamosu assisted Mr. Ezuma Igwe ("Igwe") in the acquisition of a 2012 Honda Pilot ("Pilot"), which he found using Defendant's account on the Copart auction site. The purchase price was $15,200. When Olamosu and Igwe picked up the Pilot, it did not run. In addition, Igwe was unable to get title to the car as it was subject to a lien. Falsely identifying himself as Defendant, Olamosu arranged a refund with Copart for Igwe. Defendant disputed whether he knew the details of this purchase and subsequent need for a refund.

In November 2013, Defendant and Olamosu began to have financial disputes over various transactions, which led Defendant to believe Olamosu owed him over $10,000. Olamosu told Defendant that he would pay Defendant what he owed before he left the country in January 2014.

In January 2014, Olamosu coordinated the refund with Copart, which was to be sent to Olamosu's home address. Defendant testified that

Olamosu told him about the check at this time, suggesting Defendant call Copart to ensure it sent the check. On 10 January 2014, Defendant called Copart, and requested that Copart send the check to his address instead. When the check arrived, Defendant deposited it in his personal bank account. Defendant denied knowing the check was Igwe's refund. He claimed he never met Igwe, and believed the check would constitute money Defendant owed him.

The State charged Defendant with felony conversion in violation of N.C.G.S. § 14-168.1 (2015). The indictment read in pertinent part:

> that on or about January 23, 2014, in Wake County the defendant named above unlawfully, willfully, and feloniously did being entrusted with property, 2012 Honda Pilot, *owned by Ezuma Igwe*, as a person with power of attorney to sell or transfer the property, fraudulently convert the proceeds of the property to the defendant's own use. The value of the property was in excess of $400[.]

(Emphasis added). At the conclusion of the State's evidence, Defendant moved to dismiss the charge, arguing that (1) there was insufficient evidence that Igwe owned the Pilot; and (2) there was a fatal variance between the indictment and the evidence presented at trial because there was insufficient evidence that Defendant converted the Pilot. The trial court denied the motion. At the close of all evidence, Defendant renewed the Motion to Dismiss, which the trial court again denied. Defendant was convicted of felony conversion. After Defendant paid restitution to Igwe in full, the trial court sentenced Defendant to a minimum 6 months, maximum 17 months imprisonment, which it suspended, placing Defendant on 24 months supervised probation. On 14 January 2016, Defendant entered oral notice of appeal.

Analysis

Defendant argues *inter alia* that the Motion to Dismiss should have been granted because the State failed to establish an essential element of felony conversion – ownership – and there was a fatal variance between the indictment and the evidence presented at trial as to ownership. We agree.

"This Court reviews the trial court's denial of a motion to dismiss *de novo*." *State v. Smith*, 186 N.C. App. 57, 62, 650 S.E.2d 29, 33 (2007) (citation omitted). "[T]he question for the Court is whether there is substantial evidence (1) of each essential element of the offense charged, or of a lesser offense included therein, and (2) of defendant's being the

perpetrator of such offense." *State v. Marley*, 227 N.C. App. 613, 614-15, 742 S.E.2d 634, 636 (2013) (citation omitted). Substantial evidence exists if there is "relevant evidence that [a] reasonable mind might accept as adequate to support a conclusion." *Id.* at 614, 742 S.E.2d at 635 (citation omitted). A variance between the indictment and the evidence presented at trial "occurs where the allegations in an indictment, although they may be sufficiently specific on their face, do not conform to the evidence actually established at trial." *State v. Norman*, 149 N.C. App. 588, 594, 562 S.E.2d 453, 457 (2002). Where such a variance is material, it warrants a reversal because of the concern that the defendant be "able to prepare his defense against the crime with which he is charged, and to protect the defendant from another prosecution for the same incident." *Id.* at 594, 562 S.E.2d at 457 (citations omitted).

Defendant was charged with felony conversion pursuant to N.C.G.S. § 14-168.1, which states:

> Every person entrusted with any property as bailee, lessee, tenant or lodger, or with any power of attorney for the sale or transfer thereof, who fraudulently converts the same, or the proceeds thereof, to his own use, or secretes it with a fraudulent intent to convert it to his own use, shall be guilty of a Class 3 misdemeanor.
>
> If, however, the value of the property converted or secreted, or the proceeds thereof, is in excess of four hundred dollars ($400.00), every person so converting or secreting it is guilty of a Class H felony. In all cases of doubt the jury shall, in the verdict, fix the value of the property converted or secreted.

Felony conversion "occurs when a defendant offends the ownership rights of another." *State v. Woody*, 132 N.C. App. 788, 789, 513 S.E.2d 801, 803 (1999).

> [A]n essential component of the crime is the intent to convert or the act of conversion, which by definition requires proof that someone other than a defendant owned the relevant property. Because the State is required to prove ownership, a proper indictment must identify as victim a legal entity capable of owning property. An indictment that insufficiently alleges the identity of the victim is fatally defective and cannot support conviction of either a misdemeanor or a felony.

Id. at 789-90, 513 S.E.2d at 803. "Where an indictment charges the defendant with a crime against someone other than the actual victim, such a variance is fatal." *Id.* at 790, 513 S.E.2d at 803 (quoting *State v. Abraham*, 338 N.C. 315, 340, 451 S.E.2d 131, 144 (1994)). Thus, a proper indictment for felony conversion must identify the proper victim and the State must prove ownership. *Id.* at 789-90, 513 S.E.2d at 803.

The State failed to provide substantial evidence of each essential element of felony conversion because it failed to establish that Igwe owned the Pilot. Despite alleging that Defendant was entrusted with the Pilot "owned by Ezuma Igwe," the evidence demonstrated that Igwe was never the owner of the Pilot. North Carolina law defines the owner of a motor vehicle as "a person holding the legal title to a vehicle." N.C.G.S. § 20-4.01(26) (2015). Igwe never received title to the Pilot; thus, he did not meet the definition of owner of a motor vehicle in North Carolina as to the Pilot. Moreover, a lien encumbered the Pilot that Igwe could not remove. The lack of title statutorily precluded Igwe from qualifying as an owner, and the lien further demonstrated his lack of ownership of the Pilot. Therefore, the State did not produce sufficient evidence that Igwe owned the Pilot. Since ownership is essential to establishing the elements of felony conversion, *Woody*, 132 N.C. App. at 289-90, 513 S.E.2d at 803, there was not substantial evidence of each essential element of the offense charged. The trial court erred when it failed to grant Defendant's Motion to Dismiss.

Conclusion

For the reason stated above, the trial court should have granted Defendant's Motion to Dismiss. We need not reach the additional fatal variance issue argued by Defendant or the issues related to the jury instructions.

VACATED.

Judges HUNTER, JR. and DAVIS concur.

STATE OF NORTH CAROLINA
v.
MARIE ANTOINETTE LYNCH

No. COA17-75

Filed 5 July 2017

1. Jury—motion for mistrial—prospective juror's comments in front of jurors—belief that defendant was guilty

The trial court did not err in a case involving multiple drug trafficking charges by failing to declare a mistrial after a prospective juror, in the presence of the rest of the jury pool, stated he had seen defendant around and believed that she was guilty. The trial court immediately dismissed that prospective juror and gave a lengthy curative instruction to the jury pool. Further, the prospective juror only stated that he believed defendant was guilty based on his familiarity with her in the community and did not state any specific reasons.

2. Sentencing—no clerical error—consolidation of drug trafficking offenses—inconsistency between oral judicial pronouncements

The trial court did not make a clerical error in a case involving multiple drug trafficking charges by failing to arrest judgment on a delivery offense despite previously indicating that it would. When the trial court announced its judgment at the sentencing hearing, it stated that it would consolidate all three trafficking offenses, including the delivery offense. The judgment accurately reflected the oral pronouncement and, at most, the judgment reflected an inconsistency between two separate judicial pronouncements by the trial court.

Judge ARROWOOD concurring in part and dissenting in part.

Appeal by defendant from judgments entered 17 December 2015 by Judge Phyllis M. Gorham in Duplin County Superior Court. Heard in the Court of Appeals 7 June 2017.

Attorney General Joshua H. Stein, by Assistant Attorney General Barry Bloch, for the State.

Appellate Defender Glenn Gerding, by Assistant Appellate Defender Wyatt Orsbon, for defendant.

DIETZ, Judge.

Defendant Marie Antoinette Lynch appeals her conviction and sentence on multiple drug trafficking charges. She argues that the trial court should have declared a mistrial after a prospective juror, in the presence of the rest of the jury pool, stated that "I've seen her (Lynch) around" and "I believe she did it." The trial court immediately dismissed that prospective juror and gave a lengthy curative instruction to the jury pool.

As explained below, in light of the trial court's curative instruction, the trial court's decision not to declare a mistrial was within the court's sound discretion.

Lynch also argues that the there is a clerical error in the judgment form because the court indicated that it would arrest judgment on the trafficking by delivery charge but failed to do so on the judgment form. We reject this argument because, although the court indeed indicated that it was "going to arrest judgment" on that charge at trial, at the sentencing hearing the court stated that it would instead consolidate all the trafficking charges into a single sentence. Thus, to the extent there is an error in the court's judgment, it is not a clerical one. Because this is the only ground on which Lynch challenges her sentence on appeal, we find no error in the trial court's judgment.

Facts and Procedural History

The State indicted Lynch for a number of drug trafficking offenses involving the sale of opium. The jury acquitted Lynch of some charges but found her guilty of trafficking in opium by sale; trafficking in opium by delivery; trafficking in opium by possession; and a number of related charges. The jury also found Lynch guilty of attaining habitual felon status.

Lynch was present for the first day of trial but failed to appear on later days. After the jury returned the verdict, the court continued the proceeding in order to sentence Lynch when she was present. Several weeks later, with Lynch present, the court consolidated the three trafficking convictions and sentenced her to 70 to 93 months in prison for those charges and a concurrent sentence of 67 to 93 months in prison on other related charges. Lynch timely appealed.

Analysis

I. Motion for Mistrial

[1] Lynch first argues that the trial court erred by denying her motion for a mistrial after a prospective juror stated in the presence of the jury pool that he had seen Lynch around and "I believe she did it." Lynch contends that the prospective juror's statement prejudiced the jury and that

the trial court failed to conduct an adequate inquiry of all jurors to determine whether they heard the statement, the effect of such statement, and whether they could disabuse their minds of the harmful effects of the comments. We disagree.

It is well established that "[t]he judge must declare a mistrial upon the defendant's motion if there occurs during the trial an error or legal defect in the proceedings, or conduct inside or outside the courtroom, resulting in substantial and irreparable prejudice to the defendant's case." *State v. McCollum*, 157 N.C. App. 408, 415, 579 S.E.2d 467, 471 (2003), *aff'd*, 358 N.C. 132, 591 S.E.2d 519 (2004). But "[t]he decision whether to grant a motion for mistrial rests within the sound discretion of the trial judge and will not ordinarily be disturbed on appeal absent a showing of abuse of that discretion." *State v. Boyd*, 321 N.C. 574, 579, 364 S.E.2d 118, 120 (1988). "An abuse of discretion occurs only upon a showing that the judge's ruling was so arbitrary that it could not have been the result of a reasoned decision." *State v. Salentine*, 237 N.C. App. 76, 81, 763 S.E.2d 800, 804 (2014) (citation and quotation marks omitted).

Here, a prospective juror made the unsolicited statement during jury selection that "I've seen her around Beulaville, I believe she did it." Lynch then moved for a mistrial, arguing that the statement irreparably prejudiced the jury. The trial court denied Lynch's motion and indicated that it would instruct the jury to cure any potential for prejudice. The court dismissed the juror who made the comment.

The trial court later instructed the jury pool as follows:

> All right. Ladies and gentlemen of the jury pool, I'm gonna give you an instruction. I've already instructed you earlier, but I'm going to instruct you again that the Defendant has entered a plea of not guilty. Under our system of justice a Defendant who pleads not guilty is not required to prove their innocence, but is presumed to be innocent. This presumption remains with the Defendant throughout the trial until the jury selected to hear the case is convinced from the facts and the law beyond a reasonable doubt of the guilt of the Defendant. The burden of proof is on the State to prove to you that the Defendant is guilty beyond a reasonable doubt.
>
> There's no burden or duty of any kind on the Defendant. The mere fact that a Defendant has been charged with a crime is no evidence of guilt. The charge

> is merely the mechanical or administrative way by which any person is brought to a trial.
>
> At this point, ladies and gentlemen, you are to disregard any statement that juror number nine made during this jury selection. You are not to consider any statement made by any juror during this jury selection if you are chosen to sit as a juror and hear the evidence in this case.

From the record, we see no indication that Lynch asked the trial court to conduct an inquiry into whether the statement was heard by other potential jury members, the effect of such statement, and whether the prospective jurors could disabuse their minds of any prejudice resulting from the statement.

Lynch cites *State v. Mobley*, 86 N.C. App. 528, 358 S.E.2d 689 (1987), for the proposition that the prejudicial effect of the prospective juror's statement was obvious and required a mistrial as a matter of law. In *Mobley*, a potential juror who identified himself as a police officer stated that he had "dealings with the defendant on similar charges." *Id.* at 532, 358 S.E.2d at 691. The trial court excused the juror and instructed the jury that they "strike from their mind any reference the officer may have made to the defendant because it is not evidence in the case. Completely strike it out." *Id.* at 533, 358 S.E.2d at 691. The defendant moved to dismiss the jurors based on the officer's statements and the trial court denied the motion. *Id.* at 533, 358 S.E.2d at 691–92. This Court held that the defendant was entitled to a new trial because the potential prejudice was obvious and the trial court should have dismissed the jury pool and started over:

> A statement by a police officer-juror that he knows the defendant from "similar charges" is likely to have a substantial effect on other jurors. The potential prejudice to the defendant is obvious. On the defendant's motion to dismiss the other jurors, the trial court, at the least, should have made inquiry of the other jurors as to the effect of the statement. The more prudent option for the trial court would have been to dismiss the jurors who heard the statement and start over with jury selection. In any event, the attempted curative instruction was simply not sufficient.

Id. at 533–34, 358 S.E.2d at 692.

Lynch also cites *State v. Howard*, 133 N.C. App. 614, 515 S.E.2d 740 (1999), a case that followed *Mobley*. In *Howard*, a prospective juror

stated that she had worked at the county jail and knew one of the defendants "from there." *Id.* at 615, 515 S.E.2d at 741. The trial court dismissed some jurors who heard the response and had already been seated but kept another juror who might have heard the statement. Citing *Mobley*, this Court again ordered a new trial, explaining that "[w]e do not perceive any sound reason to distinguish the situation in the case before us from that in *Mobley*." *Id.* at 618–19, 515 S.E.2d at 743.

We find these two cases distinguishable for several reasons. First, the prospective jurors who made the statements in *Mobley* and *Howard* were employed in the criminal justice system and thus their familiarity with those defendants and their criminal past likely carried more weight—and thus more potential for prejudice—than an ordinary citizen who merely knew the defendant from the community.

Second, the comments from the prospective jurors in *Mobley* and *Howard* indicated that the defendants in those cases had a criminal history. Because people assume (often incorrectly) that those with a criminal history are more likely to commit future crimes, knowledge that a defendant has a criminal past poses a significant risk of prejudice. Indeed, it is precisely because of these concerns that the Rules of Evidence restrict the State's ability to inform jurors of a defendant's criminal history or prior bad acts. *See* N.C. R. Evid. 404; *State v. Carpenter*, 361 N.C. 382, 387–88, 646 S.E.2d 105, 109–10 (2007).

Here, by contrast, the prospective juror stated only that he "believed" Lynch was guilty based on his familiarity with her in the community, without stating any specific reasons why. This is critical because it meant the jury had not learned any facts about Lynch that were outside the record in this case. They heard only the unsupported speculation of a fellow citizen.

Finally, the trial court in this case took extensive steps to remove any risk of prejudice by giving a lengthy curative instruction to ensure that the jury understood they must base their decision on the evidence presented, not on the unsupported speculation of the dismissed juror.

We note that the remark by the dismissed juror was not recorded, but that the parties agree it was made in the presence of the trial judge. Trial judges are uniquely situated to assess the potential prejudice of this sort of unsolicited statement by a member of the jury pool. In light of the trial court's curative instruction, we hold that the trial court acted well within its sound discretion in denying Lynch's motion for a mistrial. Accordingly, we reject Lynch's argument.

II. Alleged Clerical Error in the Judgment

[2] Lynch next argues that there is a clerical error in the trial court's judgments and we must remand the judgment to correct that error. Again, we disagree.

"A clerical error is defined as an error resulting from a minor mistake or inadvertence, especially in writing or copying something on the record, and not from judicial reasoning or determination." *State v. Gillespie*, 240 N.C. App. 238, 245, 771 S.E.2d 785, 790, *rev. denied*, 368 N.C. 353, 777 S.E.2d 62 (2015) (internal quotation marks and brackets omitted). "Generally, clerical errors include mistakes such as inadvertent checking of boxes on forms . . . or minor discrepancies between oral rulings and written orders . . . ." *In re D.D.J.*, 177 N.C. App. 441, 444, 628 S.E.2d 808, 811 (2006).

Here, although the trial court stated after the jury returned the verdict that it was "going to arrest judgment" on the trafficking by delivery charge, the court did not pronounce the sentence at that time because Lynch failed to appear after the first day of trial. At the sentencing hearing several weeks later, with Lynch present, the trial court announced that the jury found Lynch "guilty of Counts I, II, and III of trafficking in opium." Those counts were the charges of trafficking by sale, trafficking by delivery, and trafficking by possession. The court then stated that it was "going to consolidate the trafficking offenses into one judgment." The judgment form reflects that these three offenses were consolidated and that Lynch received a single, consolidated sentence for the three offenses.

On these facts, the trial court's failure to arrest judgment on the delivery offense was not a mere clerical error. This is not a case in which the judgment failed to conform to the court's oral ruling in a manner that suggests a mistake in recordation. Rather, despite having previously indicated that it would arrest judgment on the delivery offense, when it announced its judgment at the sentencing hearing, the court stated that it would consolidate "Counts I, II, and III"—meaning all three trafficking offenses including Count II, the delivery offense. The judgment accurately reflects that oral pronouncement. Thus, at most, the judgment reflects an inconsistency between two separate judicial pronouncements by the trial court. To the extent this is an error, it is not a clerical one. *See State v. Jarman*, 140 N.C. App. 198, 202, 535 S.E.2d 875, 878 (2000).

The dissent rightly observes that our Supreme Court has instructed us to "err on the side of caution and resolve in the defendant's favor the discrepancy between the trial court's statement in open court, as

revealed by the transcript, and the sentencing form." *State v. Morston*, 336 N.C. 381, 410, 445 S.E.2d 1, 17 (1994). But this case involves more than a mere discrepancy between the court's oral pronouncement and the judgment form; it involves a discrepancy between two separate oral pronouncements. If that type of inconsistency were treated as clerical in nature, it would greatly expand the ability of this Court to vacate and remand judgments without a showing of actual error and accompanying prejudice—something this Court has long required before vacating a trial court's judgment. Accordingly, we reject Lynch's argument that the court's judgment contains a clerical error.

Finally, we note that the reason the court initially stated that it would arrest judgment on the delivery charge was Lynch's argument (made at the conclusion of the trial but not at the sentencing hearing) that sentencing a defendant for both sale and delivery of the same controlled substance violates the Double Jeopardy Clause. Lynch does not assert a Double Jeopardy argument on appeal, instead relying solely on the clerical error argument. This Court is not permitted to address arguments not raised on appeal. N.C. R. App. P. 28(b)(6). Thus, we cannot address any potential constitutional concerns with the judgment. But because the trial court consolidated the trafficking offenses into a single sentence, there does not appear to be any prejudicial effect from the failure to arrest judgment on the delivery charge. In any event, to the extent Lynch wishes to pursue this issue, the proper vehicle to do so is a motion for appropriate relief in the trial court.

Conclusion

We find no error in the trial court's judgment.

NO ERROR.

Judge ELMORE concurs.

Judge ARROWOOD concurring in part and dissenting in part, with separate opinion.

ARROWOOD, Judge, concurring in part and dissenting in part.

I concur in the portion of the majority's opinion finding no error with respect to the issue related to defendant's motion for a mistrial. I dissent from the majority's holding that the matter should not be remanded for correction of a clerical error.

In the second issue on appeal, defendant argues that the judgment in case number 13 CRS 050960 should be remanded for correction of a clerical error.

"A clerical error is [a]n error resulting from a minor mistake or inadvertence, [especially] in writing or copying something on the record, and not from judicial reasoning or determination." *State v. Lark*, 198 N.C. App. 82, 95, 678 S.E.2d 693, 702 (2009) (citation and internal quotation marks omitted), *disc. rev. denied*, 363 N.C. 808, 692 S.E.2d 111 (2010). "It is universally recognized that a court of record has the inherent power and duty to make its records speak the truth. It has the power to amend its records, correct the mistakes of its clerk . . . , and no lapse of time will debar the court of the power to discharge this duty." *State v. Cannon*, 244 N.C. 399, 403, 94 S.E.2d 339, 342 (1956). Our Courts have stated that "[w]hen, on appeal, a clerical error is discovered in the trial court's judgment or order, it is appropriate to remand the case to the trial court for correction because of the importance that the record 'speak the truth.' " *State v. Smith*, 188 N.C. App. 842, 845, 656 S.E.2d 695, 696-97 (2008) (quoting *State v. Linemann*, 135 N.C. App. 734, 738, 522 S.E.2d 781, 784 (1999)). In *State v. Jarman*, 140 N.C. App. 198, 535 S.E.2d 875 (2000), this Court stated: "[w]here there has been uncertainty in whether an error was 'clerical,' the appellate courts have opted to 'err on the side of caution and resolve [the discrepancy] in the defendant's favor.' " *Id.* at 203, 535 S.E.2d at 879 (quoting *State v. Morston*, 336 N.C. 381, 410, 445 S.E.2d 1, 17 (1994)).

Defendant's judgment in case number 13 CRS 050960 lists three trafficking convictions: trafficking opium by sale, trafficking opium by delivery, and trafficking opium by possession. However, the trial court stated on 4 December 2015, immediately after the jury returned its verdict, that it intended to arrest judgment on the trafficking in opium by delivery conviction.

> [DEFENSE COUNSEL]: Your Honor, as to 12 CRS 50960, the December 17, 2012 offense, we would move to arrest judgment on the count two of the trafficking by delivery. I think there's some case law that says you can't be convicted or at least can't be sentenced for delivery and sale.
>
> THE COURT: And a sale. All right. Wish to be heard?
>
> [THE STATE]: No, Your Honor.
>
> THE COURT: All right. Court is going to arrest judgment on 12 CRS 50960, count two, trafficking in opium by delivery. All right.

Due to defendant's absence during trial, the court entered a prayer for judgment continued and an order for defendant's arrest with no bond. Defendant was subsequently arrested, and on 17 December 2015, the trial court commenced the sentencing hearing. The State, without mentioning the trial court's earlier ruling that it would arrest judgment as to count two of the trafficking charges, informed the trial court as follows:

> [THE STATE:] . . . . As you recall, Your Honor, the defendant was tried and convicted the week of November 30, 2015 in this courtroom in front of Your Honor, for three counts of tra[ffi]cking in opium or heroin or felony maintaining a place for keeping a controlled substance, possession of drug paraphernalia, and possession with intent to manufacture, sell, or deliver a Schedule II controlled substance. And a jury also found there were aggravating factors as related to this case. And the jury also found that she had reached the status of an habitual felon.

Thereafter, the trial court consolidated the trafficking convictions and sentenced defendant to a term of 70 to 93 months.

The State argues on appeal that the trial court "appears to have corrected its earlier ruling that it would be arresting judgment on one of the trafficking convictions." However, there is no indication in the record to support this contention. In addition, this argument fails because the trial court's oral ruling appears to be consistent with the North Carolina Supreme Court's ruling in *State v. Moore*, 327 N.C. 378, 395 S.E.2d 124 (1990). In *Moore*, the Supreme Court held that while a defendant may be indicted and tried under N.C. Gen. Stat. § 90-95(a)(1) for the transfer of a controlled substance, whether it be by selling, delivering, or both, a defendant could not be convicted of both the sale and delivery of a controlled substance arising from a single transfer. *Id.* at 382, 395 S.E.2d at 127.

In *Morston*, *supra*, the signed judgment did not comport with the trial court's statements in the transcript and our Supreme Court stated, "we believe that the better course is to err on the side of caution and resolve in the defendant's favor the discrepancy between the trial court's statement in open court, as revealed by the transcript, and the sentencing form." *Morston*, 336 N.C. at 410, 445 S.E.2d at 17.

In light of the principle set forth by our Supreme Court that the better course is to resolve a discrepancy in defendant's favor, combined with the fact that the trial court made no statement suggesting that it had changed its previous ruling arresting judgment on count two which

appears to be consistent with the interpretation of the law as discussed in *Moore*, I would find that the judgment in case 13 CRS 050960 fails to correctly reflect the trial court's ruling in open court. Accordingly, I would find that the trial court's written judgment contains a clerical error and remand the case to the trial court for correction of this error.

CASES REPORTED WITHOUT PUBLISHED OPINIONS

(FILED 5 JULY 2017)

BANK OF AM., N.A. v. RIVERA No. 16-166	Mecklenburg (13CVS9596)	Affirmed in Part; Remanded in Part
BARBOUR v. BARBOUR No. 16-782	Wake (15CVD5272)	Affirmed
ESTATE OF RUSSELL v. RUSSELL No. 17-21	Union (13CVS1611)	Affirmed
GECMC 2006-C1 CARRINGTON OAKS, LLC v. WEISS No. 16-669	Mecklenburg (12CVS3684)	Affirmed
HOLDEN v. INFICARE, INC. No. 16-1061	Forsyth (16CVS377)	Affirmed
IN RE A.P.C. No. 17-180	Hoke (15JT9)	Affirmed
IN RE B.T. No. 17-51	Cherokee (15JA62)	Vacated and Remanded
IN RE C.B. No. 17-41	New Hanover (16JA117)	Affirmed
IN RE C.M.D. No. 17-197	Rockingham (16JA58)	Reversed and Remanded
IN RE D.D.D. No. 16-1239	Cleveland (11JT31-33)	Affirmed
IN RE D.L.A.D. No. 17-262	Surry (16JT17)	Vacated
IN RE D.L.L.M. No. 16-1181	Burke (13JT109)	Vacated in part; Reversed and Remanded in part.
IN RE D.O. No. 16-1272	Wake (13JT338-341)	Affirmed
IN RE E.A.D. No. 17-133	Mecklenburg (15JT635)	Affirmed
IN RE E.C. No. 17-57	Orange (14JA52-53)	Affirmed

IN RE E.V.R. No. 16-1250	Forsyth (15J243-245)	Affirmed in part; Reversed and Remanded in part.
IN RE G.M.C. No. 16-1257	Wilkes (15JT03) (15JT04)	Affirmed
IN RE H.R.P.A. No. 17-72	Wake (16SPC51988)	Affirmed
IN RE K.E.J. No. 16-1223	Davidson (14JT26-29)	Affirmed
IN RE L.H. No. 16-1294	Onslow (13JA255-256)	Affirmed
IN RE L.P.T. No. 16-1246	Burke (14JT24-26)	Reversed
IN RE M.B. No. 16-1270	Johnston (14JA49-51)	Affirmed
IN RE M.L.E. No. 16-1180	Forsyth (14JT237)	Affirmed
IN RE P.B. No. 16-1261	Mecklenburg (14JA69)	Vacated and Remanded
IN RE P.L.B. No. 16-1116	Wilkes (12JT60)	Affirmed
IN RE R.R. No. 16-1240	Cabarrus (15JA19)	Vacated and Remanded
IN RE S.D.B. No. 16-1265	Burke (14JT98-99)	Affirmed
IN RE S.S.P. No. 17-191	Northampton (13JT20-24)	Affirmed
IN RE E.M.S-C. & B.O.S-C. No. 17-30	Columbus (16JT23-24)	Affirmed
JENNINGS v. UNIV. OF N.C. No. 16-1031	Washington (15CVS201)	Affirmed
McLAURIN v. MED. FACILITIES OF N.C., INC. No. 16-1161	Cumberland (16CVS524)	Affirmed

ROBERTS v. MARS HILL UNIV. No. 16-1093	Madison (14CVS178)	Affirmed
SAMPSON v. LANIER No. 16-1135	Guilford (14CVS10246)	Dismissed
STATE v. BASKINS No. 16-1237	Guilford (14CRS88608)	Affirmed
STATE v. BENTON No. 16-1238	Guilford (15CRS24403) (15CRS71890)	Dismissed
STATE v. COX No. 16-992	Henderson (12CRS53961-62)	Affirmed in part and Dismissed in part
STATE v. ELLISON No. 16-1127	New Hanover (15CRS54781)	No Error in part; Vacated and Remanded in part
STATE v. GRISSETT No. 16-1305	Brunswick (12CRS55968)	Affirmed
STATE v. GUERRERO No. 16-1227	Catawba (14CRS55436)	Affirmed in part and Remanded for correction of clerical errors
STATE v. HENLEY No. 16-1171	Mecklenburg (13CRS237820-22)	No Error
STATE v. HICKS No. 16-1033	Sampson (15CRS51898)	No Error
STATE v. ISOM No. 16-1052	Cabarrus (15CRS50855-56)	No Error
STATE v. KLUTTZ No. 16-1097	Davie (15CRS50048-50)	No Error
STATE v. KONIFKA No. 16-1013	Union (15CRS50380) (15CRS50920-21)	NO ERROR IN PART; DISMISSED WITHOUT PREJUDICE IN PART.
STATE v. MEINSEN No. 17-13	Halifax (14CRS52477)	NO PREJUDICIAL ERROR
STATE v. NEWBILL No. 16-1163	Mecklenburg (15CRS227785-87)	Affirmed

STATE v. OATES No. 16-903	Sampson (14CRS52713-14)	No Error
STATE v. PETERSON No. 17-26	Pitt (14CRS53250)	Vacated and Remanded for Resentencing

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